Supreme Court, U.S.
FILED
DEC 1 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO.. 87-1855

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

THOMAS K. GILHOOL,
Petitioner

v.

RUSSELL A. MUTH, JR, et al.,
Respondents

On Writ Of Certiorari To The
United States Court Of Appeals
For The Third Circuit

JOINT APPENDIX

Maria Parisi Vickers
Chief Deputy Attorney General
206 State Office Building
Philadelphia, PA 19130
(215) 560-2402
Counsel for Petitioner

Martha Field, Esq. Harvard Law School Cambridge, MA 02138 (617) 495-2962 Counsel for Respondent Muth	Joanne Sommer, Esq. 60 East Court Street Doylestown, PA 18901 (215) 345-7000 Counsel for Respondent Central Bucks School District

---

PETITION FOR CERTIORARI
FILED MAY 6, 1988

CERTIORARI GRANTED OCTOBER 3, 1988

TABLE OF CONTENTS

PAGE

A. RELEVENT DOCKET ENTRIES OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT IN DOCKET NO. 86-1610... 1

B. RELEVANT DOCKET ENTRIES OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA IN DOCKET NO. 84-2032 5

C. COMPLAINT 10

D. MEMORANDUM AND ORDER OF MARCH 18, 1985 37

E. PLAINTIFF'S MOTION TO AMEND COMPLAINT AND MEMORANDUM OF POINTS OF AUTHORITIES, JULY 8, 1985 63

F. MEMORANDUM, OPINION AND COURT ORDER OF NOVEMBER 18, 1985 71

G. SECOND AMENDED COMPLAINT, NOVEMBER 29, 1985 88

H. PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT AND MEMORANDUM OF LAW, DECEMBER 18, 1985 102

I. DEFENDANT SMITH'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT, JANUARY 6, 1986 135

PAGE

J. MEMORANDUM, OPINION AND ORDER OF JUNE 2, 1986 [Petition Appendix p. 83a] 156

K. DEFENDANT SECRETARY SMITH'S TRIAL MEMORANDUM, AUGUST 11, 1986 157

L. TRIAL TRANSCRIPT OF AUGUST 11, 1986

(1) p. 6, l. 1 to p. 7, l. 19.. 177

(2) p. 11, l. 24 to p. 17, l. 21 181

(3) p. 23, l. 9 to p. 23, l. 22 192

(4) p. 31, l. 2 to p. 37, l. 9...................... 194

(5) p. 40, l. 10 to p. 41, l. 20 204

(6) p. 46, l. 6 to l. 15 207

(7) p. 46, l. 25 to p. 47, l. 2 208

(8) p. 47, l. 17 to p. 48, l. 12 209

(9) p. 56, 1-2 210

(10) p. 57, l. 14 to p. 59, l. 8 211

PAGE

(11) p. 61, l. 21 to p. 64, l. 2 214

(12) p. 64, l. 25 to p. 65, l. 23 218

(13) p. 73, l. 2 to p. 75, l. 3 220

(14) p. 80, l. 5 to p. 82, l. 17 224

(15) p. 93, l. 25 to p. 95, l. 16 228

(16) p. 107, l. 24 to p. 108, l. 25 232

(17) p. 113, l. 20 to p. 116, l. 10 234

(18) p. 116, l. 24 to p. 117, l. 7 238

(19) p. 128, l. 22 to p. 129, l. 5 239

(20) p. 130, l. 25 to p. 131, l. 22 240

(21) p. 136, l. 26 to p. 137, l. 25 243

(22) p. 139, l. 11 to p. 140, l. 19 245

PAGE

(23) p. 144, l. 17 to p. 146, l. 7 248

(24) p. 148, l. 2 to p. 155, l. 7 251

(25) p. 171, l. 1 to p. 172, l. 19 264

M. TRIAL TRANSCRIPT OF AUGUST 12, 1986

(1) p. 3, l. 4 to p. 5, l. 17.. 268

(2) p. 8, l. 21 to p. 9, l. 5.. 273

N. TRIAL EXHIBITS

(1) CENTRAL BUCKS SCHOOL DISTRICT I.E.P. FOR FOR ALEXANDER MUTH DATED SEPTEMBER 30, 1980 - SCHOOL DISTRICT EXHIBIT 7 .... 274a

(2) PSYCHOLOGICAL CONSULTATION FOR ALEXANDER MUTH, MARCH 13, 1981 - SCHOOL DISTRICT EXHIBIT 12 275

(3) CENTRAL BUCKS SCHOOL DISTRICT PSYCHOLOGICAL REPORT, FEBRUARY 25, 1982 - SCHOOL DISTRICT EXHIBIT 14 283

PAGE

(4) CENTRAL BUCKS SCHOOL DISTRICT'S I.E.P. FOR ALEXANDER MUTH, MARCH 16, 1982 - SCHOOL DISTRICT EXHIBIT 9 .... 288a

(5) EDUCATIONAL EVALUATION BY CENTRAL BUCKS SCHOOL DISTRICT, MARCH 2, 1983 - SCHOOL DISTRICT EXHIBIT 10 289

(6) CENTRAL BUCKS SCHOOL DISTRICT I.E.P. FOR ALEXANDER MUTH, MARCH 11, 1983 AND CENTRAL BUCKS SCHOOL DISTRICT NOTICE OF RECOMMENDED ASSIGNMENT FOR ALEXANDER MUTH, MARCH 11, 1983 - SCHOOL DISTRICT EXHIBITS 1, 2, 4 .... 293a

(7) MARCH 17, 1983 CENTRAL BUCKS SCHOOL DISTRICT MEMORANDUM SUMMARIZING PROGRAM PLANNING/I.E.P. CONFERENCE OF MARCH 11, 1983 - SCHOOL DISTRICT EXHIBIT 3 294

(8) PSYCHIATRIC EVALUATION OF ALEXANDER MUTH, APRIL 30, 1983; MAY 7, 1983; MAY 14, 1983 - EXHIBIT CB-13 297

PAGE

(9) AUGUST 10, 1983 LETTER FROM ROBERT LAWS, DIRECTOR OF PUPIL SERVICES TO ROBERT MUTH - SCHOOL DISTRICT EXHIBIT 15 329

(10) SEPTEMBER 6, 1983 LETTER FROM MR. MUTH TO ROBERT LAWS - SCHOOL DISTRICT EXHIBIT 17 331

(11) EXCERPTS FROM DUE PROCESS NOTES OF TESTIMONY OF SEPTEMBER 30, 1983 - EXHIBIT CB-1

(1) p. 8, l. 16-20 332

(2) p. 27, l. 25 to p. 28, l. 9 332

(3) p. 29, l. 2-8 333

(4) p. 30, l. 2-5 333

(5) p. 31, l. 21 to p. 32, l. 16 334

(6) p. 35, l. 16 to p. 35, l. 23 335

(7) p. 37, l. 9 to p. 38, l. 17 337

(8) p. 41, l. 16 to p. 41, l. 21 339

PAGE

(9) p. 53, l. 6 339

(10) p. 55, l. 11 to
p. 56, l. 4 340

(11) p. 62, l. 20 to
p. 68, l. 7 341

(12) p. 69, l. 18-22 ... 350

(13) p. 70, l. 17 to p. 75
p. 75, l. 24 350

(14) p. 77, l. 7 to p. 80,
l. 17 359

(15) p. 83, l. 24 to p. 84,
p. 84, l. 20 364

(16) p. 87, l. 19 to p. 88,
p. 88, l. 7 366

(17) p. 100, l. 14-14 ... 367

(18) p. 101, l. 17 to
p. 106, l. 3 368

(19) p. 110, l. 1 to
p. 111, l. 17 375

(20) p. 112, l. 18, to
p. 113, l. 2 378

(21) p. 114, l. 23 to
p. 118, l. 7 378

(22) p. 124, l. 3 to
p. 125, l. 9 384

PAGE

(23) p. 126, l. 25 to p. 128, l. 1 386

(24) p. 139, l. 13, to p. 140, l. 23 387

(25) p. 160, l. 11 to p. 160, l. 16 390

(26) p. 164, l. 3 to p. 167, l. 7 390

(27) p. 173, l. 4 to p. 174, l. 7 395

(28) p. 179, l. 14-20 ... 397

(29) p. 181, l. 2 to p. 183, l. 22 398

(30) p. 186, l. 3 to p. 187, l. 1 402

(31) p. 187, l. 14 to p. 187, l. 21 404

(32) p. 192, l. 10-23 ... 404

(33) p. 195, l. 7 to p. 197, l. 3 405

(12) REPORT OF THE HEARING OFFICER FROM THE DUE PROCESS HEARING HELD ON SEPTEMBER 30, 1983, DECIDED OCTOBER 31, 1983 - PLAINTIFF'S EXHIBIT 1 409

PAGE

(13) OPINION OF THE SECRETARY OF EDUCATION ON MR. MUTH'S AND SCHOOL DISTRICT'S APPEAL FROM THE HEARING OFFICER'S REPORT, JANUARY 23, 1984 - PLAINTIFF'S EXHIBIT 2 428

(14) LETTER FROM CHARLES M. NEILL, SUPERVISOR OF SPECIAL EDUCATION TO MR. MUTH, MAY 1, 1984 - SCHOOL DISTRICT'S EXHIBIT CB-18 438

(15) EXCERPTS FROM DUE PROCESS NOTES OF TESTIMONY OF JUNE 7, 1984 - EXHIBIT CB-2

(1) p. 3, l. 1 to p. 3, l. 9 440

(2) p. 8, l. 7 to p. 9, l. 15 440

(3) p. 35, l. 6, to p. 38, l. 1 443

(4) p. 40, l. 2 to p. 40, l. 18 448

(5) p. 41, l. 16 to p. 42, l. 17 449

(6) p. 50, l. 25 to p. 52, l. 2 451

PAGE

(7) p. 53, l. 16 to p. 55, l. 7 453

(8) p. 58, l. 17 to p. 59, l. 14 456

(16) REPORT OF THE HEARING OFFICER FROM THE DUE PROCESS HEARING HELD ON JUNE 7, 1984, JULY 25, 1984 - PLAINTIFF'S EXHIBIT 3 458

(17) DEPOSITION NOTES OF TESTIMONY OF JUDITH TOLSON, JULY 21, 1986 - EXHIBIT CB-3 465

(18) CENTRAL BUCKS I.E.P. 1986-87 - EXHIBIT CB-9 .... 486a

O. FINDINGS OF FACT, DISCUSSION, CONCLUSIONS OF LAW AND ORDER OF AUGUST 28, 1988 [Petition Appendix p. 112a] 487

P. OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, JANUARY 29, 1988 [Petition Appendix p. 1a] 488

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

MUTH, Jr., RUSSELL A., :
individually and as next
friend of Muth, Robert :
Alexander

v. : NO. 86-1610

CENTRAL BUCKS SCHOOL
DISTRICT, DR. NEWMAN, :
THOMAS L., Superintendent
of the Central Bucks :
School District and
MARGARET A. SMITH, :
SECRETARY OF EDUCATION
COMMONWEALTH OF :
PENNSYLVANIA

Margaret A. Smith,
Secretary of Pennsylvania
Department of Education

Appellant

(Related Cases 86-1605; 86-1629; 87-1130; 87-1134; 87-1159)

DOCKET ENTRIES

1987

Apr. 3	Motion by Pennsyvania for Retarded Citizens (PARC) and Pennsylvania Association for Children and Adults with Learning Disabilities (PACLD) for Leave to file an amicus

	curiae brief within the time fixed for filing of applt's RB, filed (Cv. 86-1605, 1610, 1629, 87-1130, 1134, 1159) (dt)
Apr. 6	Order (Clerk) granting above motion, filed (Cv. 86-1605, 1610, 1629, 87-1130, 1134, 1159) (dt)
May 5	Copy of DC order dd. 5/1/87 denying plff's mot. purs. to Fed.R.Civ.P. 60, etc., filed. (Cov. 86-1605, 1610, 1629, 87-1130, 1134, 1159) (sdt)
1988	
Feb. 12	Pet. for Rhng. in banc by Sec. of Education, Commonwealth of Pennsylvania, w/serv. filed (bj).
Feb. 29	Order (Gibbons, CH. J., Seitz, Weiss, Higginbotham, Sloviter, Becker, Stapleton, Greenberg, Hutchinson, Scirica, Cowen & Van Dusen, C.J.'s) denying the petition for rehearing fld., by Muth and Sec. of Education, fld., (bj), (cvs. 86-1605, 1610, 1629, 87-1130, 1134, 1159) (bj)
Mar. 2	Motion to Stay Mandate, to and incl. 4-6-88, from Appee (Secy. Edu.) w/serv. fld. (bj) (cvs. 86-1605,

	1610, 1629, 87-1130/34/59) (bj)
Mar. 11	Order (Staplenton, C.J.) Granting above motion to & incl. 4-6-88 (Filed. (bj) (cvs. 86-1605, 1610/1629, 87-1130/34/59) (bj)
Mar. 18	Ltr. dated 3-16-88 from J.D. Sommer, Esq., advising Central Bucks School Dist. had no objections to Cmwlth. Pa.'s motion to stay the mandate, and would not be filing an answer, w/serv. Rec'd for the information of the Court. (bj) (cvs. 86-1605/10/29, 87-1130/34/59) (bj)
Apr. 4	Motion for Further Stay of Mandate, by Aplee to and including 5/6/88, w/serv. filed (bj) (cvs. 86-1605/10/29, 87-1130/34/59) (bj)
Apr. 21	Order (Stapleton, C.J.) granting further stay to and incl. May 6, 1988, fld. (bj) (cvs. 86-16-5/10/29, 87-1130/34/59) (bj)
May 10	Ltr. dated 5/9/88 from M.P. Vickers, Esq. advising Cert. was mailed to Sup. Ct. on May 6, 1988 w/serv., rec'd. (bj) (cvs. 86-1605,10,29 & 87-1130/4/&59)

May 23	Cert. copy of Cert. filed on 5/6/88 @S.C.#87-1855, frm Clk of Supreme Court, fld. (bj) (cvs. 86-1605/20/29 & 87-1130/34/59) (bj)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR., : CIVIL ACTION
et al :

Plaintiffs :

v.

CENTRAL BUCKS SCHOOL
DISTRICT, et al., :

Defendants : No. 84-2032

DOCKET ENTRIES

Entry No.	1984	
1	Apr. 27	Complaint filed
	1985	
16	Feb. 8	PLFF'S MOTION FOR PRELIMINARY INJUNCTIVE RELIEF, MEMO, CERT OF SERVICE, FILED.
20	Feb. 27	ORDER THAT THE PLFF MAY FILE AN AMENDED COMPLAINT, FILED. 2-27-85 Entered & copies mailed.
23	Mar. 18	MEMORANDUM & ORDER THAT DEFT'S MOTION FOR SUMMARY JUDGMENT IS GRANTED IN PART AND DENIED IN PART. JUDGMENT IS ENTERED FOR DEFT

	AND AGAINST PLFF AS TO PLFF'S CLAIM FOR TUITION REIMBURSEMENT, FILED. 3-18-85 Entered & copies mailed.
24 Mar. 19	MEMORANDUM & ORDER THAT PLFF'S CLAIM FOR TUITION REIMBURSEMENT IS DISMISSED, ETC., FILED. 3-19-85 Entered & copies mailed.
26 Mar. 21	Amended Complaint, filed.
37 July 8	PLFF'S MOTION TO AMEND THE COMPLAINT, CERTIFICATE OF SERVICE, MEMO, FILED. (SECOND AMENDED COMPLAINT ATTACHED).
38 July 10	ORDER THAT PLFF'S CLAIM FOR TUITION REIMBURSEMENT IS REINSTATED, FILED. 7/10/85 ENTERED & COPIES MAILED.
39 July 15	Plff's. Supplemental Memo in Support of Motion to Amend, Certificate of Service, filed.
53 Nov. 19	MEMORANDUM & ORDER THAT PLFF'S MOTION FOR LEAVE TO AMEND IS GRANTED IN PART. PLFF SHALL FILE & SERVE FORTHWITH A SECOND AMENDED COMPLAINT WHICH FULLY COMPLIES WITH THE ACCOMPANYING MEMORANDUM OPINION WITHIN 15 DAYS OF

		THE DATE OF THIS ORDER, FILED. 11/19/85 ENTERED & COPIES MAILED.
55	Nov. 29	Second Amended Complaint, filed.
--	" 29	Summons on Second Amended Complaint exit. (mailed to counsel)
58	Dec. 18	PLFF'S MOTION FOR SUMMARY JUDGMENT, MEMO, CERT OF SERVICE, FILED.
	1986	
59	Jan. 6	Deft. Central Bucks School Dist. & Dr. Thomas Newman's Answer to Motion for Summary Judgment, Memo, Cert. of Service, exhibits, filed.
63	Jan. 30	Deft. Smith's Memorandum of Law in opposition to Plff's Motion for Summary Judgment, cert of service, filed.
64	Jan. 31	Deft. Mgt. A. Smith's Answer to Plff's Second Amended Complaint, cert. of service, filed.
65	June 3	MEMORANDUM & ORDER THAT PLFF'S MOTION FOR SUMMARY JUDGMENT IS GRANTED IN PART JUDGMENT IS ENTERED IN FAVOR OF PLFF & AGAINST DEFTS AS TO PLFF'S CLAIM THAT THE PENNA. ADMINISTRATIVE

	PROCEDURE CONTRAVENES FEDERAL LAW. CONFERENCE SCHEDULED FOR 6/24/86, 1:30 p.m. CHAMBERS, RM 12614 U.S.CTHS, PHILA. PA., FILED. 6/3/86 entered & copies mailed.
66 Jun 26	ORDER DATED 6/26/86, HUYETT, 3rd, THAT THIS NON-JURY CASE SHALL BE CALLED FOR TRIAL ON 8/11/86 AT 9:30 A.M. IN COURTROOM 12-A, ETC., FILED. 6/27/86: Entered and copies mailed.
68 Jul. 29	Plff's Trial Brief, cert of service, filed.
69 Jul. 29	Plff's Proposed Findings of Fact, Conclusions of Law, filed.
71 Aug. 6	ORDER THAT THIS NON JURY CASE BE CALLED FOR TRIAL 8/11/86, 9:30 AM, CTRM 12-A, COUNSEL FOR COMMONWEALTH TO FILE MEMORANDUM OF LAW ON APPLICABILITY OF 11th AMENDMENT BY NOON 8/7/86, PLFF'S RESPONSE 8/11/86, FILED. 8/6/86 entered & copies mailed.
72 Aug. 11	Deft. Secy Smith's Trial Memorandum, cert of service, filed.

78 Aug. 28	FINDINGS OF FACT, DISCUSSION, CONCLUSIONS OF LAW AND ORDER, FILED. 8/28/86 entered & copies mailed.
79 Aug. 28	ORDER THAT JUDGMENT IS ENTERED IN FAVOR OF PLFF AS TO HIS CLAIM FOR TUITION REIMBURSEMENT FOR THE 1983-1984 YEAR, JUDGMENT IS ENTERED IN FAVOR OF DEFTS & AGAINST PLFFS AS TO ALL OTHER CLAIMS. 8/28/86 entered & copies mailed.
87 Sept. 29	Deft. Mgt. Smith Secy of Pa. Dept. of Ed.'s Notice of Appeal, filed. 9/30/86 copies to R.Muth, J.Sommer, Esq., M.Vickers, J.Huyett, D.Spitz, Clerk, USCA
88 Sept. 29	Copy of Clerk's Notice, filed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. : CIVIL ACTION
individually and on
behalf of his minor child,
ROBERT ALEXANDER MUTH :

Plaintiff :

v. : NO. 84-2032

ROBERT C. WILBURN,
Secretary of Education
of the Commonwealth
of Pennsylvania
and :
CENTRAL BUCKS SCHOOL
DISTRICT
and :
DR. THOMAS L. NEWMAN
SUPERINTENDENT of the
Central Bucks School
District, : COMPLAINT

Defendants :

I. PRELIMINARY STATEMENT

1. This is a civil action seeking declaratory and injunctive relief and compensatory damages for the plaintiffs against the Pennsylvania Secretary of

Education, the Central Bucks School District, and their officials, on the basis that the defendants School District, through their officials, are failing and refusing to provide and the Secretary is failing to order an appropriate educational placement/program for the minor plaintiff, a gifted handicapped child. These actions and refusals to act are in violation of federal and state law and the equal protection and due process clauses of the United States Constitution.

II. JURISDICTION

2. The jurisdiction of this Court is invoked pursuant to 20 U.S.C. §1415(e)(2) of the Education for All Handicapped Children Act of 1975,

20 U.S.C. §1401 et seq., in that this action is brought by plaintiffs aggrieved by a final decision of the defendant Secretary of Education regarding a complaint presented pursuant to 20 U.S.C. §1415(c); pursuant to 28 U.S.C. §§1343(3) and (4) in that this is an action brought pursuant to 42 U.S.C. §1983 to redress the deprivation under color of state law of rights, privileges and immunities secured to the plaintiffs under the U.S. Constitution and acts of Congress providing for the equal rights of citizens, including the Rehabilitation Act of 1973, 29 U.S.C. §794; pursuant to 28 U.S.C. §1331, in that the amount in controversy as to each of the named plaintiffs, exclusive of interest and costs, exceeds the value of $10,000 and this action arises under the Fourteenth

Amendment to the U.S. Constitution and the laws of the United States. Additionally, declaratory relief is sought pursuant to 29 U.S.C. §§2201 and 2202, and this court is asked to exercise its pendent jurisdiction over plaintiffs' state claims against the school district defendants, in that the state and federal claims arise from a common nucleus of facts, and should be tried in a single judicial proceeding.

3. The plaintiffs have no adequate remedy at law and have suffered, and unless the defendants and their agents, representatives and employees are permanently restrained, will continue to suffer immediate and irreparable harm from the course of conduct of which they complain herein.

III. PARTIES

4. The named plaintiffs are as follows:

(a) Robert Alexander Muth (hereinafter "Alexander") is a learning disabled student of gifted intelligence who brings this suit by his parent and next friend, Russell A. Muth, Jr. Alexander resides with his father at 66 Springs Drive, Doylestown, Pennsylvania, 18901. He is a resident of the Central Bucks School District.

(b) Russell A. Muth, Jr., is the parent of Robert Alexander Muth. They reside at 66 Springs Drive, Doylestown, Pennsylvania 18901.

5. The defendants are as follows:

(a) Robert C. Wilburn, Secretary of Education of Commonwealth of Pennsylvania, and as its chief executive officer is responsible for the administration and operation of the Pennsylvania Department of Education (hereinafter "Department"), including the Department's "Bureau of Special and Compensatory Education." As the state educational agency, the Department is responsible for insuring that all requirements of the Education for All Handicapped Children Act, 20 U.S.C. §§1401 er seq. (hereinafter "P.L. 94-142") are carried out by each school district in Pennsylvania, defendant's School District. Defendant Robert C. Wilburn whose business address is Pennsylvania department of Education, Box 911, Harrisburg, Pennsylvania 17126, is sued in his official capacity. (Hereinafter defendant Robert C. Wilburn is referred to as "the Secretary".)

(b) The Central Bucks School District (hereinafter "School District"), is a governmental unit which contains and administers the public schools in Doylestown, Pennsylvania 18901. The administrative offices of the School District are located at 315 West State Street, Doylestown, Pennsylvania 18901.

(c) Dr. Thomas L. Newman is Superintendent of the School District and, as such, is responsible for the day-to-day supervision of the public schools in the School District; he is also responsible for assuring that the School District's special education programs are operated in accordance with applicable federal and state law. Defendant Dr. Thomas L. Newman, whose business address is 315 West State Street, Doylestown, Pennsylvania 18901, is sued in his official capacity.

IV. FACTUAL ALLEGATIONS

6. Under federal and state law, local school districts in Pennsylvania must provide each handicapped student with a free appropriate public education, that is a program of instruction and related services specially designed to meet each handicapped child's individual/unique educational needs without cost to the child's parents.

7. The Pennsylvania Department of Education, as the state educational agency, is responsible for insuring that this mandate is carried out with respect to each handicapped student in the Commonwealth.

8. Whenever possible, free appropriate public education is to be provided in public programs operated by school districts and Intermediate Units. However, when the available public programs are not adequate, private sector resources must be sued and must be publicly funded.

9. State and federal law further require that all handicapped children and their parents or guardians be given access to due process procedures by which they may challenge, inter alia, all decisions regarding their educational placements. These procedures include a due process hearing before an impartial hearing officer, an appeal from the decision of the hearing officer to the Secretary, and an appeal from a final decision of the Secretary to federal or state court. 20 U.S.C.

§1415; 34 C.F.R. §§300.506-511; 22 Pa. Code §§13.32, 13.33.

10. The Department and the defendant School District are recipients of federal financial assistance, including assistance pursuant to P.L. 94-142.

11. The minor plaintiff, Robert Alexander Muth, is a gifted learning disabled student experiencing severe learning disabilities with secondary emotional problems.

12. Robert Alexander Muth entered the Central Bucks School System in September of 1980 at the Paul W. Kutz Elementary School. He was placed in the Kutz's School Resource Room with part-time mainstreaming in Art and Music. Alexander demonstrated no significant habilitation or remediation of his learning disability during the 1980 to 1981 school year. A pattern of

teacher harassment developed. In September of 1981, Alexander was placed in a newly opened second resource room at the Kutz School, partly to terminate the poor teacher to student interaction and partly to give the student one-to-one teaching with a learning disabilities teacher, Margaret Tilghman. Only minimum progress was shown during the 1981 to 1982 School year. In September of 1982, Alexander was transferred from the Paul W. Kutz Elementary School to the Lenape Junior High School and the gaps between his expected levels of performance/competence (mastery of the 7th grade level of education) and his actual level of performance (as measured by the district's own standarized tests) were as follows: In mathematics Exlander scored with a 5.9 total grade score, behind 1.1 years. In spelling Alexander scored with a 3.3 total grade score level, behind 3.7 years. In reading Alexander scored at the 3.6 grade level, behind 3.4 years.

13. When Alexander Muth entered the Central Bucks School System, the gap between his expected level of performance (4th grade competency) and his actual level of performance as shown by tests results submitted to the Central Bucks School by Dr. Thomas E. Atkins of Children's Hospital of Philadelphia was two (2) years. By June of 1983, Robert Alexander Muth's demonstrated level of competence was between three (3) to four (4) years below grade level, demonstrating a marked deterioration in his academic training, a glaring deficit when

Alexander's gifted intelligence is taken into consideration.

14. As a result of his inappropriate educational programing Alexander has displayed significant emotional distress which has conspicuously interferred with the learning, habilitation, and remediation process and the development of secondary emotional decompensation, i.e. characterized by the appearance of excessive anxiety or depression resulting in partial academic disablement and much suffering.

15. After these years of failure, in , (sic) Mr. Russell A. Muth, Jr., Alexander's parent, requested that for school year 1983-84 the defendant School district and its officials place Alexander in a private school with the supportive services necessary to meet

his individual needs, and publicly fund that program.

16. School District refused to place Alexander into an appropriate private school.

17. Alexander's father requested a due process hearing in accordance with legally required due process procedures. In addition, Alexander was placed in the Landmark School on the advice Dr. William Adamson, who felt that an additional year in the Lenape Junior High School of the Central Bucks School system would be very detrimental to his mental health.

18. Alexander was placed at the Beverly Farms Campus at Landmark in a program for dyslexic students with expressive language deficits like Alexander's i.e., a program crafted for dyslexis children with "subtle

dysphasia". The initial expense for enrollment of Alexander into this program has been born primarily by his father; his father's resources are virtually at an end.

19. Alexander Muth has made dramatic education programs. Recent tests indicate he has grown/demonsotrates 1.7 years of growth in spelling, 1.2 years in reading and 2.2 years in mathematics. Overall he has shown 1 and 3/4 years of growth and has begun closing the gap between his expected level of competence and his actual level of performance which heretofore had only spread apart wider. Alexander has achieved the ability to leave his emotional stress at the classroom door and does not let his emotional overlay interfer with his academic program.

20. Should Alexander be forced to leave Landmark School, his dynamic academic progress will retrogress and he will lose the very skills he has begun to acquire, his emotional overlay will re-appear, and his physical and emotional well-being will be endangered.

21. In September 30, 1983, a due process hearing was held before Venard Trent hearing officer appointed by the Department of Education regarding, inter alia, Alexander's right to an appropriate special education. On October 30, 1983, a decision was issued by the hearing officer. In that decision the hearing officer found an extremely intelligent severely learning disabled youngster who had not received an appropriate education program from his school and who required an

appropriate special education in a more restrictive educational setting than the district could offer. The hearing officer held _inter alia_:

A. Alexander was of average to mentally gifted intelligence and should be provided appropriate special education in a more restrictive educational setting.

B. That Alexander had not made appreciable gains in reading and that his socio-emotional difficulties had been exacerbated by the current educational placement;

C. That changes in the public program available to Alex had not alleviated the emotional distress or facilitated the acquisition of necessary academic, social and vocational skills;

D. That Alex has a significant auditory perceptual dysfunction which had not been remediated throughout his educational program;

E. That, when developing a program for Alex, his potential to function within the mentally gifted range must be considered, and he must be provided special activities and services not ordinarily provided in a regular program.

22. School District disputed vigorously the findings and recommendations of the hearing officer and persisted in its old view unwilling to admit and accept the ruling of the Hearing Officer and appealed to Secretary of Education. Alex and his father cross-appealed on the grounds that, while finding in their favor on every factual issue, the Hearing Officer had failed to order a placement in a

private school similar to the Landmark School.

23. The Secretary of Education, in violation of his duty to issue a final order within 45 days of the receipt of an appeal, instead ordered the matter reconsidered by the very district personnel who continue to misunderstand and misdiagnose the needs of the student.

24. Parent has met burden of showing the school district cannot provide Alex with the free appropriate public education to which he is by law entitled, and at this point in his educational career, such a program can only be provided in a private school setting such as the Landmark School.

CAUSE OF ACTION I.

25. Plaintiffs incorporate herein by reference paragraphs 1 through 24 above.

26. P.L. 94-142 provides that all public agencies such as the defendants School District and the Department must insure that all handicapped children have available to them a free appropriate public education which includes special education and related services to meet their individual needs. 20 U.S.C. §§1412(5)(B) and 1414(a)(C)(iv); 45 C.F.R. §§121a.1, 121a500-556.

27. The minor plaintiff, Robert Alexander Muth, is a handicapped child under definition set out in P.L. 94-142. 20 U.S.C. §1401(a); 45 C.F.R. §121a.5.

28. As the state educational agency, the Department of Education is responsible for insuring that all requirements of P.L. 94-142 are carried out by each school district and intermediate unit in the Commonwealth State of Pennsylvania, including the defendants School District and Intermediate Unit. 20 U.S.C. §1412(6), 45 C.F.R. §121a. 600(a). Defendant Wilburn is the Chief Executive Officer of the Department.

29. The failure and refusal of the local defendants to place, and of the defendant Secretary to order the placement of Robert Alexander Muth in an appropriate education setting violates plaintiff's rights under the above-cited sections of P.L. 94-142.

CAUSE OF ACTION II.

30. Plaintiffs incorporates herein by reference paragraphs 1 through 29 above.

31. Section 504 of the Rehabilitation Act of 1973, 29 U.S.C. §794, provides that "no otherwise handicapped individual in the United States... shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance."

32. Federal regulations promulgated pursuant to the above statute, 34 C.F.R. §§300.31 et seq., require, inter alia, that all recipients of federal financial assistance shall provide a free appropriate education to each qualified

handicapped person who is a legal resident of the recipient's jurisdiction, regardless of the nature or severity of such person's handicap. 45 C.F.R. §§84.31-84.39.

33. The minor plaintiff is a qualified handicapped person within the definitions set out in §504 of the Rehabilitation Act of 1973 and its implementing regulations, and the Department and defendants School District are recipients of federal financial assistance.

34. The failure and refusal of the local defendants to provide, and of the defendant Secretary to order placement of Robert Alexander in a private school placement where he may be given appropriate educational program equal to his non-handicapped peers violates minor plaintiff's rights under §504 of the

Rehabilitation Act of 1973 and the above-cited implementing regulations.

CAUSE OF ACTION III.

35. Plaintiff incorporates herein by reference paragraphs 1 through 34 above.

36. The above-described actions and failures to act of defendants deny to the minor plaintiff his rights to receive an equal education with others in violation of the equal protection and due process clauses of the Fourteenth Amendment to the United States Constitution.

CAUSE OF ACTION IV
Pendent State Claim

37. Plaintiffs incorporates herein

by reference paragraphs 1 through 36 above.

38. Pennsylvania statutes and regulations mandate that an appropriate program of education and related services be provided for each school-aged handicapped child. 24 P.S. §13-1371 et seq., 22 Pa.Code Chapters 13 and 341.

39. The above-described failures and refusals to act by the defendant's School District and its officials deny to the minor plaintiff herein his right to a free appropriate program of education and training.

WHEREFORE, the plaintiff pray for the following relief:

1. That this court take jurisdiction of this matter.

2. That this court grant declaratory relief, pursuant to

28 U.S.C. §§2201 and 2202, declaring that the defendants are in violation of the above-cited statutory and constitutional provisions as set forth herein, and that this court take jurisdiction of plaintiffs' pendent state claim.

3. That this court order the defendant School District and defendant Department of Education to fund the education of Alex at the Landmark School or similar educational institution;

4. That this court order defendant school district and defendant Department of Education to pay plaintiffs damages in the amount of the tuition paid by them to Landmark School which was as of the filing of this complaint is $10,825.00.

5. That this court should order

such other relief as it deems necessary and proper.

6. That this court should order the payment of reasonable attorney's fees and costs to plaintiffs.

/S/ Alexander Hemphill
Attorney for Plaintiff

OF COUNSEL:

MONTEVERDE, HEMPHILL, MASCHMEYER & OBERT
1610 Two Penn Center Plaza
Philadelphia, Pennsylvania 19102

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. : CIVIL ACTION
individually and on
behalf of his minor child,
ROBERT ALEXANDER MUTH :

v. :

ROBERT C. WILBURN, et al : No. 84-2032

MEMORANDUM AND ORDER

HUYETT, J. March 18, 1985

Plaintiff Russell A. Muth, Jr., individually and on behalf of his minor child, Robert Alexander Muth, brough this action seeking declaratory and injunctive relief and compensatory damages in the amount of $10,825.00 against defendant Robert C. Wilburn, Secretary of Education, Central Bucks School District and Dr. Thomas L. Newman, Superintendent of the Central

Bucks School District. Mr. Muth seeks relief based on defendants' alleged failure to order an appropriate educational placement program for the minor plaintiff, a gifted handicapped child.

Presently before me is defendant Wilburn's motion for summary judgment based on the following issues: jurisdiction over the defendant is barred by the eleventh amendment to the United States Constitution; plaintiff cannot recover the cost of his son's out-of-state private school tuition under the Education For For All Handicapped Children Act, the procedures of the Education for All Handicapped Children Act precludes relief under § 1983 of the Civil Rights Act, and § 504 of the Rehabilitation Act may not be utilized to circumvent the procedures and remedies of the Education For All Handicapped Children Act. After defendant filed his motion for summary judgment, plaintiff, with my leave, filed an amended complaint. In his amended complaint, plaintiff dropped his claims pursuant to section 504 of the Rehabilitation Act and section 1983. Therefore, I will only consider defendant's first two arguments.

FACTS

Robert Alexander Muth enrolled as a student in the Central Bucks School District in 1980. Prior to his enrollment, he was, at the request of his family physician, Dr. Tucker, and his father, evaluated by a clinical psychologist. Alexander was diagnosed as a learning disabled child under

22 Pa.Code §§ 341.1, 13.1, and was placed in a special education program for learning disabled students. An Individualized Educational Program ("I.E.P.") for Alexander was developed, as required by the School Code, and implemented.

On March 11, 1983, Mr. Muth received a notice of recommended assignment and an I.E.P. plan which recommended additional mainstreaming for his son. Prior to the implementation of the March 1983 program changes, an educational evaluation, a psychological evaluation and an auditory analysis were conducted by a Multidisciplinary Team. Meetings were held between Alexander's father and the members of the Multidisciplinary Team in which it was agreed that the new I.E.P. program would be instituted on a diagnostic basis with close monitoring of Alexander's progress.

In June of 1983, a meeting was held between district personnel and Mr. Muth to evaluate Alexander's progress and to develop a proposal for the upcoming 1983-1984 school year. At that time, it was recommended that Alexander's mainstreaming be discontinued and that he be placed in a self-contained learning disabilities classroom, a more restrictive learning environment.

On June 20, 1983, the Central Bucks School District received a request for a due process hearing from Mr. Muth. Plaintiff asked the District not to make any changes in Alexander's March 1983 I.E.P. In September, Alexander was removed from the Central Bucks School District and was enrolled at the Landmark School in Massachusetts, a private school, by his father. At this time, Mr. Muth also asked the Central Bucks School District to develop a new I.E.P. for Alexander.

On September 30, 1983, a due process hearing was held before Hearing Officer Bernard Trent. At the hearing, the School District presented the March 11, 1983 I.E.P. along with the June 17, 1983 recommended changes for the 1983-1984 school year. Mr. Muth presented a psychiatric report. On October 31, 1983, Mr. Trent issued his decision in which he concluded that Alexander was an extremely intelligent but severely learning disabled child who had not received an appropriate special education and he held that when developing a program for Alexander the School District had to consider the potential to function within the gifted range and provide him with special activities and services not ordinarily provided in a regular program.

Both the School District and plaintiff appealed the Hearing Officer's decision to the Secretary of Education of the Commonwealth of Pennsylvania pursuant to 22 Pa. Code § 13.32(24) and 34 C.F.R. § 300.510(a). Plaintiff appealed on the grounds that although the Hearing Officer had found in their favor on every factual issue, he has not ordered placement in a private school similar to the Landmark School as plaintiffs had requested. The Secretary of Education remanded the case on January 23, 1984 to the Hearing Officer with instructions to the District to present additional information in the form of a revised I.E.P. reflecting the June 17, 1983 recommendations.

Mr. Muth was invited to participate in the I.E.P. conference and a meeting was scheduled for March 28, 1984. At the March meeting, Alexander's I.E.P. was revised to encompass the June 1983 recommendations although Mr. Muth was unable to attend. On April 27, 1984, the Multidisciplinary Team reconvened the I.E.P. meeting at which time Mr. Muth was in attendance. Mr. Muth's concerns were addressed in a further revised I.E.P., but plaintiff did not agree to the Recommended Assignment and a hearing was held before Mr. Trent on June 7, 1984. In the meantime, plaintiff initiated the present suit.

Mr. Trent issued his decision on July 25, 1984, in which he stated that modifications and adjustments which the Central Bucks County District made to the March 28, 1984 I.E.P. constituted an appropriate program of special education for Alexander. On appeal, the Secretary adopted the Hearing Officer's conclusions and dismissed plaintiff's exceptions. Plaintiff now appeals from this order.

ELEVENTH AMENDMENT

In his motion for summary judgment, defendant Robert Wilburn asserts that jurisdiction over him is barred by the eleventh amendment of the United States Constitution. The eleventh amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against any one of the United States by citizens of another State, or by citizens or subjects of any Foreign State.

In the absence of consent to sue or a Congressional abrogation of its sovereign immunity, a state is immune from suit brought by one of its citizens. Hans v. Louisiana, 134 U.S. 1 (1980) and therefore a federal court is without jurisdiction over the action. The eleventh amendment immunity generally extends to a state's agencies or departments. Pennhurst v. Halderman, 52 U.S.L.W. 4155, 4158 (1984). Similarly, the eleventh amendment bars a suit against state officials when "the state is the real, substantial party in interest." Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945).

In Ex Parte Young, 209 U.S. 123 (1908), the Court established an important exception to the general sovereign immunity rule. Enjoining the Attorney General of the State of

Minnesota from bringing suit to enforce a state statute that allegedly violated the fourteenth amendment, the Court held that an official who acts unconstitutionally is stripped of his immunity because the state could not authorize his unconstitutional action. Similarly, in Edelman v. Jordan, 415 U.S. 651 (1974), the Court held that when an official has violated federal law, the federal court may award an injunction that governs the official's future conduct but not one that awards retroactive monetary relief.

Plaintiff, in filing this action, seeks several forms of relief including a declaratory judgment that the defendants are in violation of the Education For All Handicapped Children Act, section 504 of the Rehabilitation Act, and various provisions of the

United States Constitution, an injunction whereby defendants will be ordered to fund the education of Alexander at a private school similar to the Landmark School and an award of damages in the amount of the tuition paid by plaintiff to Landmark School since Alexander was removed from the Central Bucks School District. Defendant Wilburn asserts that jurisdiction over him is barred by the eleventh amendment of the United States Constitution and concludes the section of his memorandum of law pertaining to the eleventh amendment by asserting that the plaintiff's claims for retroactive monetary relief from the Commonwealth is barred by the eleventh amendment. To the extent that defendant Wilburn's position is based on the latter statement, I accept it, but I cannot conclude that plaintiff's entire action against defendant Wilburn is barred by the eleventh amendment.

Plaintiff's claim for damages in the amount of the tuition paid to the Landmark School is essentially a claim against the state.[1] The amount would almost certainly be paid out of the state treasury and not out of the pockets of Mr. Wilburn, a state official. Retroactive monetary relief of this type is clearly barred by the eleventh amendment. Pennhurst, 52 U.S.L.W. at 4158, Edelman, 415 U.S. at 668.

---

[1] In his amended complaint, plaintiff substituted the name of Margaret A. Smith, the new Secretary of Education, for that of Robert Wilburn. This step emphasizes the point that Mr. Wilburn was sued in his official capacity and any judgment against him in the form of damages would really be a judgment against the Commonwealth.

> When the action is one for recovery of money from the State, the State is the real, substantial party in interest and is entitled to invoke its sovereign immunity from suit even though individual officers are nominal defendants.

Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 464 (1945). Therefore, plaintiff's claim for tuition reimbursement must be dismissed as barred by the eleventh amendment.

It is not clear from his motion whether defendant Wilburn is also contending that the remainder of plaintiff's claims are barred by the eleventh amendment. Assuming that this is his position, it must nevertheless be rejected. Plaintiff seeks an injunction ordering defendants Wilburn and Central Bucks School District to fund the education of Alexander at a private school like the Landmark School Although such an order would entail the expenditure of state monies, the claim is not necessarily barred by the eleventh amendment. In Edelman v. Jordan, 415 U.S. 651, 667-68 (1973), the Court noted that fiscal consequences to a state's treasury are often the necessary result of compliance in the future with a substantive federal question determination. What is necessary is an allegation that the state official has violated either a constitutional provision or federal law. Cory v. White, 457 U.S. 85, 91 (1981); Worcester County Trust Co. v. Riley, 302 U.S. 292 (1937).

In this case, plaintiff has alleged that defendant has violated the Educational For All Handicapped Children Act. The fact that an adjudication in plaintiff's favor may necessitate expenditure by the state in the form of tuition does not bar this action from proceeding under the eleventh amendment. An injunction requiring the payment of tuition would only be imposed if it is concluded that defendant Wilburn, a state official, violated federal law. See Graham v. Richardson, 403 U.S. 365 (1971) (Arizona and Pennsylvania welfare officials were prohibited from denying welfare benefits to otherwise qualified recipients who were aliens.)

Plaintiff also seeks a declaratory judgment that defendant Wilburn has violated the Education For All

Handicapped Children Act. A judgment by this court that defendant Wilburn has or has not violated federal law will not run afoul of the eleventh amendment. As the Court noted in Pennhurst, 52 U.S.L.W. at 4159, the doctrine first set forth in Ex Parte Young, 209 U.S. 123 (1908) is necessary to permit the federal courts "to vindicate federal rights and hold state officials responsible to the 'supreme authority of the United States.'" The supreme authority of the United States is encompassed in both the United States Constitution and the federal law passed by Congress.

EDUCATION FOR ALL HANDICAPPED CHILDREN ACT

The Education ForAll Handicapped Children Act (EAHCA) requires states to

(1) establish procedures for consultation for individuals involved in the education of handicapped children, 20 U.S.C. § 1412(7); (2) submit plans outlining their policies and procedures for compliance with the Act, 20 U.S.C. § 1412(4) and (7); (3) improve procedures for the evaluation and placement of handicapped children, 20 U.S.C. § 1412(5); and (4) establish procedural safeguards for parents or guardians to challenge the administrative determination of the evaluation and educational placement of their handicapped children, 20 U.S.C. § 1415. It is this last provision that is the focus of the present case. Plaintiff contests the administrative determination that Alexander's needs can adequately be met in the public school system. Moreover, while they were in

the midst of the administrative process, plaintiff decided unilaterally to withdraw Alexander from the public school and enroll him at the private Landmark School. Plaintiff now seeks reimbursement from defendant Wilburn as well as the School District for the tuition expenses incurred. Defendant asserts that plaintiff is not entitled to this reimbursement under the EAHCA.

Section 300.513 of title 34 of the Code of Federal Regulations states:

> During the pendency of any administrative or judicial proceeding regarding a complaint, unless the public agency and the parents of child agree otherwise, the child involved in the complaint must remain in his or her present educational placement.

In this case, there was no agreement between the school or the Department of

Education and Mr. Muth to remove Alexander from the public school and place him in the Landmark School, Mr. Muth acted unilaterally and therefore in violation of the regulations governing the EAHCA. In Stemple v. Board of Ed. of Prince George's Cty., 623 F.2d 893 (4th Cir. 1980), the court held that parents may not elect unilaterally to place their child in private school and then seek to recover the tuition costs incurred. As the court in Zvi D. by Shirley D. v. Ambach, 694 F.2d 904 (2d Cir. 1982) noted when ruling that a parent was not entitled to reimbursement, 34 C.F.R. § 300.513 (1981) is, in effect, an automatic preliminary injunction and therefore substitutes an absolute rule in favor of the status quo for the court's discretionary consideration.

Therefore, in this case, plaintiff may not recover damages in the amount of the tuition from defendant Wilburn.

The Supreme Court will soon have the opportunity to resolve the question of whether a parent who has unilaterally placed his or her child in private school is entitled to tuition reimbursement. Town of Burlington v. Dept. of Education Commission of Mass., 736 F.2d 773 (1st Cir.), cert. granted, 53 U.S.L.W. 3417 (1984). In the meantime, however, I will follow the cases of the Fourth and Second Circuits. The Burlington court held that parents who prevail ultimately on their claim that the school has failed to develop or implement an appropriate IEP are entitled to tuition benefits.

Plaintiff relies on Anderson v. Thompson, 658 F.2d 1205 (7th Cir. 1981) in support of their position that reimbursement of tuition expenses is available under the EAHCA. Holding that the district court properly declined to award compensatory damages for the expenses arising out of the child's private education tuition, the court concluded that monetary damages under the EAHCA are not allowable absent exceptional circumstances. These circumstances include situations in which the handicapped educational services in dispute were necessary to protect the physical well-being of the child or in which the defendant has acted in bad faith by failing to comply with the procedural provisions of the Education For All Handicapped Children Act. Plaintiff contends that Alexander's psychological and emotional well-being necessitated his transfer to the private school. As the court in Anderson, however, made clear, it is only in exceptionally rare situations that unilateral transfer of a child will be justified. Moreover, I am convinced that the Stemple court's approach is correct. Just as a school district will not be allowed unilaterally to cease tuition payments during ongoing administrative or judicial proceedings so will a parent be required to abide by the status quo pending a final administrative or judicial determination. See Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982). Defendant's motion to dismiss plaintiff's claim for tuition reimbursement therefore will be granted.

An appropriate order follows.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. individually and on behalf of his minor child, ROBERT ALEXANDER MUTH	:	CIVIL ACTION
v.	:	
ROBERT C. WILBURN, et al	:	No. 84-2032

ORDER

NOW, March 18, 1985, upon consideration of defendant Wilburn's motion for summary judgment, plaintiff's response thereto, the memoranda of law submitted by the parties, and for the reasons stated in the accompanying memorandum, IT IS ORDERED that defendant's motion is GRANTED IN PART AND DENIED IN PART. Judgment is entered for defendant and against plaintiff as to plaintiff's claim for tuition reimbursement.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR., : CIVIL ACTION
et al :

Plaintiffs :

v.

CENTRAL BUCKS SCHOOL
DISTRICT, et al., :

Defendants : No. 84-2032

MOTION TO AMEND THE COMPLAINT

Plaintiff respectfully moves this Court to grant him leave to amend the complaint in the above-captioned matter to raise certain issues not previously raised. The issues concern due process violations committed by the Secretary of Education, Robert Wilburn, through his participation in the state level hearing, and the exorbitant amount of time spent on the administrative proceedings, both in direct violation of The Education for All Handicapped Children Act ("EHA"), 20 U.S.C. §§ 1400-1461.

The reasons supporting this motion appear in the accompanying memorandum of points and authorities.

Respectfully submitted,

/s/Matthew S. Bogin
BOGIN AND EIG
1630 Connecticut Avenue,
N.W., Suite 701
Washington, D.C. 20009
(202) 667-7373

Counsel for plaintiffs

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR., : CIVIL ACTION
et al :

Plaintiffs :

v.

CENTRAL BUCKS SCHOOL
DISTRICT, et al., :

Defendants : No. 84-2032

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION TO AMEND COMPLAINT

Because it is in the interest of justice, this Court should grant plaintiff's motion to amend the complaint in this matter, pursuant to Fed. R. Civ. P. 15(a).

As the Court is aware, plaintiff's counsel has only recently entered his appearance in this case. Previous counsel failed to raise a number of issues that are of great importance to the determination of this cause, and should be raised. The first of these is the participation of Secretary of Education Wilburn in the state level review of the due process hearing.

Secretary's Wilburn's participation unquestionably violated plaintiff's rights under the Education for All Handicapped Children Act ("EHA"), 20 U.S.C. §S 1400-1461. The EHA specifically provides that due process hearings shall not be conducted "by an employee of [any] agency or unit involved in the education or care of the child."[1] The Act's implementing regulations elaborate further on who is ineligible to serve as impartial hearing officer at either the local or state level. A hearing may not be conducted by a person who is an employee of a public agency involved in the care or education of the child, nor may it be conducted by anyone having a personal or professional interest in the outcome of the hearing.[2] The legislative history of the EHA demonstrates that employees of the agency involved in educating the child are prohibited from serving as hearing officers at the administrative level.[3]

---

[1] 20 U.S.C § 1415(b)(2) (1981).

Most importantly, the Third Circuit ruled, prior to the state level review in this case, that the use of an employee of the Delaware Department of Public Instruction as a state reviewing officer was "per se a denial of the impartial review guaranteed by 20 U.S.C. § 1415(c)." Grymes v. Madden, 672 F.2d 321, 322 (3d Cir. 1982). See also, Helms v. McDaniel, 657 F.2d 800 n. 9 (5th Cir. 1981); Robert M. v. Benton, 634 F.2d 1139, 1141-42 (8th Cir. 1980).

---

[2] 34 C.F.R. §§300.507(a)(1) and (2) (1982).

[3] See Sen. Conf. Rep. No. 455, 94th Cong., 1st Sess. 49, reprinted in (1975) U.S. Code Cong. & Ad. New 1425, 1502.

This issue is crucial to plaintiff's case, and must be raised. It is in the interest of justice to allow it to be raised now, because it is an issue that is appropriate for resolution without a trial, thus shortening this litigation.

Another issue crucial to plaintiff's case, yet not raised previously is the exorbitant amount of time spent on administrative proceedings. The EHA's implementing regulations require that the decision at the local hearing level be reached within forty-five days of receipt of the hearing request, 34 C.F.R. § 300.512(a), and at the state hearing level that it be reached within thirty days. 34 C.F.R. § 300.512(b). Yet, in this case considerably more time elapsed. Again, it is in the interest of justice to allow this issue to be raised here because it also is one in which the facts are clear, thus allowing for resolution without trial.

As demonstrated in this memorandum, it is in the interest of justice to allow the filing of this amended complaint. No other party will be prejudiced, and judicial economy will be served because these issues may be decided without a trial, thus speeding resolution of the case.

Respectfully submitted,

/s/Matthew S. Bogin
BOGIN AND EIG
1630 Connecticut Avenue,
N.W., Suite 701
Washington, D.C. 20009
(202) 667-7373

Counsel for plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. : CIVIL ACTION
individually and on
behalf of his minor child,
ROBERT ALEXANDER MUTH :

v.

CENTRAL BUCKS SCHOOL
DISTRICT
and
DR. THOMAS L. NEWMAN
Superintendent of the
Central Bucks School
District : No. 84-2032

MEMORANDUM OPINION AND ORDER

HUYETT, J. NOVEMBER 18, 1985

Plaintiff Russell A. Muth, Jr., individually and on behalf of his son, Robert Alexander Muth, has filed a motion for leave to file a second amended complaint.[1]

---

[1] It is not clear from the proposed second amended complaint whether there

(Footnote continued on next page)

Plaintiff contend that leave should be granted because he has recently retained new counsel and prior counsel failed to raise certain important claims. For the reasons stated below, I will grant the motion in part and deny it in part.

---

[1](Footnote continued from previous page)

are two plaintiffs or only one. In several places in the complaint, the term "plaintiffs' is used, but paragraph III.1 of the amended complaint states in pertinent part: "[t]he plaintiffs are Russell A. Muth, the father of Robert Alexander Muth, a learning disabled child ..." From this language, it appears that only the father is the plaintiff despite the use of the plural. Therefore, throughout the memorandum opinion I shall refer to only one plaintiff which is consistent with the caption on the original complaint.

Federal Rule of Civil Procedure 15(a) provides in pertinent part: "a party may amend his pleading only by leave of court or by written consent of the adverse party; and leave shall be freely given when justice so requires." Determining when justice requires permission to amend rests within the sound discretion of the trial court. Zenith Radio Corp. v. Hazeltine Research Corp., 401 U.S. 321 (1971). In Foman v. Davis, 371 U.S. 178 (1962), the Court held that absent "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, [or] undue prejudice to the opposing party by virtue of allowance of the amendment," leave should be "freely given." Another factor which a court may properly consider is whether the proposed amendment states a cause of action, i.e. whether it would survive a motion to dismiss. In other words, leave should not be granted where amendment would serve no purpose. 3 Moore's Federal Practice ¶15.08[4].

If permitted, this would be the second amendment plaintiff has made to his complaint. I note that the original complaint was filed on April 27, 1984, and this action was scheduled to go to trial on August 14, 1985. The delay which has resulted has been caused entirely by the filing of the present motion by plaintiff. I also note that plaintiff's previous counsel stipulated to the dismissal from this action of defendant Wilburn, then Secretary of Education. In the second amended complaint, plaintiff seeks to bring the new Secretary of Education, Margaret Smith, back in to the case individually and in her official capacity. Plaintiff also adds several claims against defendants Central Bucks School District and Dr. Thomas L. Newman, Superintendent of that District. I will address the proposed amendment claims against the defendants in seriatim starting with the Secretary of Education.

A stipulation of dismissal pursuant to Fed.R.Civ.P. 41(a) is a dismissal without prejudice unless the stipulation states to the contrary. 5 Moore's Federal Practice ¶41.02[4]. In this case, the stipulation entered into by plaintiff's previous counsel and counsel for the Secretary of Education states in pertinent part: "[i]t is hereby Stipulated and agreed ... that the

Complaint in this action be dismissed as to defendant Robert C. Wilburn, Secretary of Education, Commonwealth of Pennsylvania." Because the stipulation does not provide that the dismissal is with prejudice it must be assumed that it is without. Nevertheless, the stipulation reflects the prejudice which may be caused to defendant Secretary of Education by bringing her into the case at this late date. Once the stipulation was entered into, all discovery between the parties ceased, and the case proceeded as if the Secretary had never been a party. As I previously noted, this case was scheduled to go to trial on August 14, 1985, but because of the plaintiff's filing the present motion, trial has been delayed. If the Secretary is brought back into the case, additional delay will be inevitable in order to permit the Secretary to prepare adequately for trial. I note, however, that it is plaintiff, or his son, who is harmed most by the delay and it is plaintiff who has caused the delay. I am concerned that plaintiff be given every opportunity to state his claims as fully as possible.

I will address each of the claims plaintiff intends to raise against the Secretary of Education to determine whether amendment will serve any purpose. In count one of his proposed second amended complaint, plaintiff alleges that the Secretary of Education's involvement in this matter violates plaintiff's rights under the Education for All Handicapped Children Act (EHCA), 20 U.S.C. §1401 _et_ _seq_. and violates plaintiff's right to due process of law as guaranteed by the fourteenth amendment. Section 1415(b)(2) of title 20 of the United States Code states in pertinent part:

> (2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

Plaintiff contends that because the Secretary of Education reviewed the hearing officer's decision and ordered the case remanded to the hearing officer, the Secretary has violated §1415(b)(2) which provides that a parent of a handicapped child is entitled to an impartial due process hearing. Section 300.507 of title 34 of the Code of Federal Regulations requires that the hearing be held by an impartial hearing officer, i.e. a person who is not an employee of a public agency which is involved in the education or care of the child.

Section 1415(c) provides, however, for the review of a local administrative agency decision by the state educational agency. This provision would suggest that review of the administrative process may be conducted by the Secretary of Education. My understanding of plaintiff's contention, however, is that because the initial impartial hearing, under Pennsylvania law, is conducted by the state educational agency, section 1415(c) never comes into play; section 13.32 of title 22 of the Pennsylvania Code provides that the hearing officer shall be assigned by the Secretary. Because I believe plaintiff has stated a cause of action raising essentially a legal issue which will not necessitate additional discovery, I will permit amendment of the complaint to add this claim.

In count two of the second amended complaint, plaintiff contends that the delays in the due process procedure in this case violate his rights under the EHCA and the due process clause of the fourteenth amendment. Plaintiff has never raised this issue, and to raise this issue at this time will necessitate extensive additional discovery and preparation by all of the defendants.

Nevertheless, I will permit plaintiff to add a claim based on the EHCA. I also remind plaintiff that any delay which results, and I will have to permit adequate time for defendants to prepare to defend against this issue, will be a consequence of plaintiff's actions here.

In his first amended complaint, plaintiff dropped his claim based on the equal protection and due process clauses. I specifically noted that fact in my order of April 11, 1985 modifying my opinions of March 18 and March 19. Therefore, to the extent plaintiff's claims in count one and two are based on the fourteenth amendment, I will not permit their addition to the complaint. I believe, however, that the basis of the claims raised in these two counts really lies in the alleged violation of the EHCA.

In counts five and six of the second amended complaint plaintiff raises claims which I have previously addressed in response to defendant Secretary of Education's motion for summary judgment. To the extent plaintiff seeks reimbursement of tuition expenses from the state, amendment will not be permitted. I have previously ruled that reimbursement for tuition expenses is barred by the eleventh amendment. To the extent plaintiff seeks injunctive relief, I am reluctant to permit the amendment because this is precisely the issue upon which the stipulation to dismiss was based. To permit plaintiff to amend the complaint a second time to reinstate the precise claim which had previously been raised against the

Secretary of Education at this late date would be unduly prejudicial and would unnecessarily delay the trial. Therefore, I will deny plaintiff's request to amend the complaint to add counts five and six.

In her response to plaintiff's motion for leave to amend the complaint for a second time, the new Secretary of Education Margaret A. Smith contends that she cannot be sued individually because she was not an officer at the time of the incidents giving rise to this action and therefore took no part in any of the decision-making processes. I agree with her contention and therefore will not permit plaintiff to proceed against her individually. I do not agree, however, with Ms. Smith's contention that because she was not personally involved in the administrative process, she cannot be sued in her official capacity for a violation arising from the fact that the appeal of the hearing officer's decision was heard by the Secretary of Education, then Secretary Wilburn. The office of Secretary of Education cannot be made immune from a lawsuit simply because a new person occupies that office.

I note that there has been a stipulation between counsel that the portion of plaintiffs' proposed second amended complaint alleging individual liability on the part of defendant Dr. Thomas L. Neman is withdrawn. Defendants Central Bucks School District also argue that amendment of the complaint to add claims based on the fourteenth amendment should not be permitted at this time because plaintiff previously dropped these claims. As I have noted in connection with my discussion of the claims against the Secretary of Education, I shall not permit amendment of the complaint to add claims based upon the fourteenth amendment.

I will, however, permit the claim based upon the EHCA. I note that while this claim, count two, seems to be directed at the Secretary of Education, it may also apply to the other two defendants.

An appropriate order follows.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. : CIVIL ACTION
individually and on
behalf of his minor child,
ROBERT ALEXANDER MUTH :

v.

CENTRAL BUCKS SCHOOL
DISTRICT
and
DR. THOMAS L. NEWMAN
Superintendent of the
Central Bucks School
District : No. 84-2032

ORDER

NOW, November 18, 1985, upon consideration of plaintiff's motion for leave to file a second amended complaint, defendants' responses, the memoranda of law submitted by the parties, and for the reasons stated in the accompanying memorandum opinion, IT IS ORDERED that

1. Plaintiff's motion for leave to amend is GRANTED IN PART.

2. Plaintiff shall file and serve forthwith a second amended complaint which fully complies with the accompanying memorandum opinion within fifteen days of the date of this order.

/S/ Daniel H. Huyett, 3rd, Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. : CIVIL ACTION
individually and as
next friend of
ROBERT ALEXANDER MUTH, :
Plaintiff

v.

MARGARET A. SMITH :
Secretary of Education,
Commonwealth of
Pennsylvania

THOMAS L. NEWMAN :
Superintendent,
Central Bucks School
District,

CENTRAL BUCKS SCHOOL
DISTRICT,
Defendants : No. 84-2032

SECOND AMENDED COMPLAINT

I. INTRODUCTION

This case demonstrates the harm that can occur when there is a failure to provide a severely learning disabled child with what Congress sought to guarantee in the Education for All Handicapped Children Act ("EHA"), a free appropriate education. The detailed and elaborate procedures developed by Congress in the EHA were designed to prevent what has occurred in this case, such substantial delays in providing a free appropriate education that the right Congress sought to protect is vitiated. Without this Court's intervention, Alexander Muth will be deprived of the services to which he is entitled, and which are necessary to allow him to function in our society.

II. JURISDICTION

This Court has jurisdiction pursuant to the Education for Handicapped Children Act ("EHA"), 20 U.S.C. §§1415(2) and (4) and 28 U.S.C. §1331.

III. PARTIES

1. The plaintiff is Russell A. Muth, the father of Robert Alexander Muth, a learning disabled child as defined by 20 U.S.C. §1401(15), and thus eligible for services provided under the EHA. The Muths reside at 66 Springs Drive, Doylestown, Pennsylvania 18901, which is located in the Central Bucks School District.

2. Margaret A. Smith is the Secretary of Education of the Commonwealth of Pennsylvania, and as such is the head of the "state educational agency" ("SEA"), as defined by 20 U.S.C. §1401(7). As head of the SEA defendant Smith is responsible for insuring that all handicapped children, including Alexander Muth, are provided with a free appropriate education.

She is sued in her capacity as head of the SEA. Defendant Smith's address is Box 911, Harrisburg, Pa. 17126.

3. Defendant Thomas L. Newman is the Superintendent of the Central Bucks School District, the "local educational agency" ("LEA") as defined by 20 U.S.C. §1401(8). As head of the LEA, defendant Newman is responsible for insuring that all handicapped children in the Central Bucks School District are provided with a free appropriate education. His business address is 315 West State Street, Doylestown, Pa. 18901. He is sued in his official capacity.

4. Defendant Central Bucks School District ("District") is the LEA which is charged by the EHA with providing Alexander Muth, and all other handicapped children under its

jurisdiction, with a free appropriate education.

IV. FACTUAL ALLEGATIONS

5. Alexander Muth is a handicapped child within the meaning of the EHA.

6. Specifically, his handicapping condition is that of specific learning disabilities.

7. Alexander Muth was enrolled in the Paul W. Kutz Elementary School, a program operated by defendant District, in September, 1980.

8. He attended the Kutz School during school years 1980-81 and 1981-82.

9. In September of 1982, he entered the Lenape Junior High School, also a program operated by defendant District.

10. He attended Lenape Junior High School for the entire 1982-83 school year.

11. Prior to his entry at the Kutz School, Alexander Muth was evaluated by Dr. Thomas Atkins, a clinical psychologist at The Children's Hospital of Philadelphia.

12. Dr. Atkins determined that Alexander was learning disabled with severe deficits in language.

13. When he began at the Kutz School, Alexander Muth was placed by defendant District in a learning disabilities resource room program.

14. He continued in that program during the 1980-81 school year.

15. The resource room program was continued during the 1981-82 school year.

16. Defendant District modified Alexander's program when he began Lenape Junior High School and he was placed in a resource room solely for reading and mathematics and was placed in regular education for all other subjects.

17. Alexander did not progress during the 1982-83 school year at Lenape Junior High School.

18. Alexander began the 1983-84 school year at Lenape, but shortly after the start of the school year he was placed by his father at the Landmark School in Prides Crossing, Massachusetts.

19. On June 17, 1983, plaintiff Russell Muth requested a due process hearing concerning the lack of an appropriate education for his son, Alexander.

20. On September 30, 1983, a due process hearing was held pursuant to Mr. Muth's request.

21. Neither Russell nor Alexander Muth consented to any extension of the requirements contained in 34 C.F.R. §300.512(a).

22. On October 31, 1983, Vernard Trent, the Hearing Officer, rendered his decision.

23. In that decision, the Hearing Officer held that the individualized educational program developed by defendant District and its proposed program were not appropriate to meet the child's needs.

24. The Hearing Officer did not order the child's placement in a particular program, but he did require the District to provide "special

activities or services not ordinarily provided in the regular program."

25. Both the Muths and defendant District filed exceptions to the Hearing Officer's decision with the Secretary of Education.

26. The Secretary did not hold a hearing.

27. On January 23, 1984, the Secretary issued a decision remanding the matter back to the hearing Officer for further proceedings.

28. The Secretary held that the Hearing Officer erred in not considering the defendant District's alleged modifications to the IEP.

29. The Secretary's decision was filed more than thirty days after the receipt of the Muth's exceptions.

30. The Muths did not consent to any extension of the timelines contained in 34 C.F.R. §300.512(b).

31. On or about September 14, 1983, Alexander Muth was placed at the Landmark School in Prides Crossing, Massachusetts, a program specializing in the education of language-impaired, learning disabled children, and an appropriate educational program for Alexander Muth.

32. On July 25, 1984, the Hearing Officer rendered a second decision in this case.

33. This decision was rendered over one year after the request for a due process hearing was received.

34. The plaintiffs did not consent to this extension of the timelines contained in 34 C.F.R. §300.512(a).

COUNT I

35. Plaintiffs repeat and reallege paragraphs 1-34.

36. The Secretary of Education's participation in this matter violates plaintiff's rights under the EHA, in particular those guaranteed by 20 U.S.C. §1415(b)(2), as interpreted by the United States Court of Appeals for the Third Circuit in Grymes v. Madden, 672 F.2d 231.

COUNT II

37. Plaintiffs repeat and reallege paragraphs 1-36.

38. The delays in the due process system in this case violate plaintiffs' rights under the EHA, in particular those guaranteed by 34 C.F.R. §300.512.

COUNT III

39. Plaintiffs repeat and reallege paragraphs 1-38.

40. The failure to defendant District to provide Alexander Muth with a free appropriate education violates plaintiff's rights under the EHA.

COUNT IV

41. Plaintiffs repeat and reallege paragraphs 1-40.

42. Defendant District's refusal to place Alexander Muth at the Landmark School violates his rights under the EHA.

WHEREFORE, plaintiff respectfully requests that this Court:

1. Enter judgment for plaintiff;

2. Order defendants to place and fund Alexander Muth at the Landmark School for the 1983-84 school year;

3. Order defendants to reimburse Russell Muth for any funds he expended in providing Alexander Muth with a free appropriate education;

4. Enjoin the Secretary of Education of the Commonwealth of Pennsylvania from participating in the due process system;

5. Order the Secretary to provide impartial hearing officers in state level appeals;

6. Award plaintiffs the sum of twenty-five thousand dollars ($25,000.00) as compensatory damages jointly and severally against all defendants for violation of plaintiffs' rights to due process of law;

7. Award plaintiffs attorneys fees and other costs of this action;

8. Award plaintiffs any other relief this Court deems just.

/S/ Matthew B. Bogin
Bogin and Eig
1630 Connecticut Avenue, N.W.
Washington, D.C. 20009
(202) 667-7373

Counsel for Plaintiffs

[Certificate of Service omitted]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR., individually and on behalf of his minor child, ROBERT ALEXANDER MUTH,	:	CIVIL ACTION
Plaintiff,	:	
v.		
CENTRAL BUCKS SCHOOL DISTRICT, et al.,	:	
Defendants.	:	No. 84-2032

MOTION FOR SUMMARY JUDGMENT

Pursuant to Federal Rule of Civil Procedure 56, plaintiff respectfully requests that this Court enter summary judgment in his favor. The grounds for this motion appear in the accompanying memorandum of points and authorities and exhibits.

Respectfully submitted,

/s/Matthew B. Bogin

BOGIN & EIG
1630 Connecticut Avenue, N.W.
Suite 701
Washington, D.C. 20009
(202) 667-7373

Counsel for Plaintiff

[Certificate of Service omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR., : CIVIL ACTION
individually and on
behalf of his minor child,
ROBERT ALEXANDER MUTH,
Plaintiff :

v.

CENTRAL BUCKS
SCHOOL DISTRICT, et al,
Defendants : No. 84-2032

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

FACTUAL BACKGROUND

Robert Alexander Muth, ("Alexander") is a handicapped child, entitled to special education and related services under the Education for All Handicapped Children Act ("EHA"). He is diagnosed as learning disabled, with severe language deficits. Plaintiff's Exhibit 1, pp. 1, 3.

In September, 1980, Alexander was enrolled in the Paul W. Kutz Elementary School -- a program operated by defendant Central Bucks School District ("School District") -- where he was placed in a learning disabilities resource room program. He remained in that placement for the academic years 1980-81 and 1981-82. In September, 1982, Alexander was enrolled at Lenape Junior High School --another program operated by defendant School District. At Lenape, the School District placed Alexander in regular education for all subjects except reading and mathematics. Plaintiff's Exhibit 2, p. 1. He remained in that placement for the entire 1982-83 academic year, but did not progress. Plaintiff's Exhibit 2, p. 3.

On June 17, 1983, plaintiff requested a due process hearing to address the School District's failure to provide an appropriate education for Alexander. A due process hearing was held on September 30, 1983, and the Hearing Officer rendered a decision on October 31, 1983. Plaintiff's Exhibit 1. This violated the timeline contained in 22 Pa. Code § 13.32(21), which requires the Hearing Officer to rule within twenty days. Plaintiff did not consent to any extension of time.

The Hearing Officer found that the School District's Individualized Education Program ("IEP") and proposed program were inappropriate to meet Alexander's educational needs. Id. at pp. 4-5; Plaintiff's Exhibit 2, p.2. The Hearing Officer did not order placement in any particular program;

however, he did direct the School District to "explore alternative placement in a more restrictive educational setting." Plaintiff's Exhibit 1, p. 5.

Plaintiff was aggrieved by this result; however, under state law he did not have the option of initiating litigation, but rather was forced to file exceptions with the Secretary of Education ("Secretary"). 22 Pa. Code § 13.32(24); and see Lisa H. v. State Board of Education, 447 A.2d 669, 674-75 (Pa. 1982). See also Plaintiff's Exhibit 5 (the State's due process explanations which are supplied to parents of handicapped children such as Alexander Muth). The Secretary did not hold a hearing, but rendered a decision on January 23, 1984, holding that the Hearing Officer erred by

> failing to consider the School District's alleged modifications to Alexander's IEP, and remanding the matter to the Hearing Officer for further proceedings.

Plaintiff's Exhibit 2, pp. 3-4. The Secretary did not render his decision within thirty days, as prescribed by law. 34 C.F.R. § 300.512(b). Again, plaintiff had not consented to any extension of time.

Because there had been no resolution of plaintiff's dispute with the School District when school began in September, 1983, Alexander was enrolled again at Lenape. However, the obvious inappropriateness of this placement caused the plaintiff to enroll Alexander at the Landmark School in Prides Crossing, Massachusetts on or about September 14, 1983. The Landmark School provides a program that specializes in the education of language-impaired, learning disabled children. This was an appropriate placement for Alexander for the 1983-84 academic year.

On July 25, 1984, more than one year after plaintiff's request for a due process hearing, the Hearing Officer issued a second decision in Alexander's case. Plaintiff's Exhibit 3. The legal time limits were again violated, without the plaintiff's consent. 34 C.F.R. § 300.512(a). The Hearing Officer found the School District's program appropriate, in light of "modifications" made to Alexander's IEP. _Id._ at p. 2. Plaintiff again was forced to file exceptions to the Secretary of Education. The Secretary dismissed plaintiff's exceptions and adopted the Hearing Officer's findings of fact, conclusions of law and recommendations. Plaintiff's Exhibit 4. Appeal to this Court followed.

ARGUMENT

There are no material facts in dispute and plaintiff is entitled to judgment as a matter of law, pursuant to Federal Rule of Civil Procedure 56.

I. The Procedures Followed Here Violated The "Finality" Requirement of Federal Law

The Education for All Handicapped Children Act ("EHA"), provides that participating states may elect to establish either a one-level or a two-level hearing process. 20 U.S.C. § 1415. If a state elects to establish a one-level system, hearings are conducted by the State Education Agency

("SEA"), and the decisions of the Hearing Officer are final administrative decisions, susceptible of being appealed to a court of competent jurisdiction. Id. at §§ 1415(b)(2) and (e)(1). If a state chooses the two-level system, a hearing will be conducted by the Local Education Agency ("LEA"), e.g., the defendant School District in this case, with the right to appeal an adverse determination to the SEA, and then to court. Id. at §§ 1415(b)(2) and (c). In order to participate in the federal program, a state must implement one of these impartial hearing systems.[1]

---

[1] The EHA conditions a state's eligibility for participation on the establishment of "procedural safeguards are required by section 1415 of this title." 20 U.S.C. § 1415(5).

Pennsylvania has instituted a system that fits neither description. Instead, it has fashioned an illegal hybrid process that deprives handicapped children and their parents of the finality guaranteed to them under the EHA, as well as the impartiality to which they are entitled under federal law. See Section II., infra. Pennsylvania law provides that due process hearings are to be conducted by "the Secretary or the designee of the Secretary [of Education]." 22 Pa. Code § 13.32(2). In practice, the Secretary does not personally conduct due process hearings; however, the Secretary designates individuals to conduct the hearings and then hears appeals from the decisions of these designees. Id. at § 13.32(24).

Thus, the hearing is conducted by the SEA, but is not a final administrative decision -- the prerequisite to initiating litigation. Instead, the same state agency that rendered the original decision is responsible for reviewing that decision. Courts that have considered this issue previously have found that such a system contravenes federal law, notwithstanding any attempt to characterize the Hearing Officer as a "special master" making a "report" to the Secretary of Education.[2]

In Helms v. McDaniel, 657 F.2d 800, 805-06 (1981), the Fifth Circuit held that:

---

[2] There are strong indications that this is the view in Pennsylvania. Pa. Code §§ 13.32(2) and (12).

> In treating the findings of the state reviewing officer as the findings of a special master, the state board [of Education] fails to comply with the requirement that this decision be final unless appealed to state or federal court .... This system not only contravenes the specific requirement of finality; it undermines the enforcement structure created by the Act. The EHA provides that the goal of an appropriate education will be achieved through conference and hearings. To safeguard the right to an appropriate education, Congress made unmistakably clear that the hearings provided by the Act were to be impartial and result in final decisions. If a state board may, at its discretion, reject the results of this process, the entire system of procedural safeguards is nullified at a single stroke.

This is inconsistent with the conclusion reached a year earlier in Monahan v. State of Nebraska, 491 F. Supp. 1074 (D. Neb. 1980), affirmed in part and vacated in part on other grounds, 645 F.2d 592 (8th Cir. 1981).[3] The Court in Monahan considered a similar due process hearing structure and determined that:

> [I]t appears that [under state law] the Commissioner of Education has the discretionary authority to accept, reject or modify the decision made in the due process hearing. Such discretion conflicts with the federal requirement that the decision made in the due

---

[3] Subsequently, dismissed as moot sub nom Rose v. State of Nebraska, 530 F. Supp. 295 (D. Neb. 1981), dismissal for mootness affirmed in part and vacated in part sub nom Monahan v. State of Nebraska, 687 F.2d 1164 (8th Cir. 1982).

> process hearing shall be final except for judicial review. [Citations omitted].

491 F. Supp. at 1091. As elucidated in both of the opinions cited above, it is impermissible for a state to set up a system that allows the Secretary of Education to review the findings and decision of a state-level hearing officer. Yet, that is exactly what the State of Pennsylvania has done, in violation of the EHA and the Supremcy Clause of the United States Constitution.[4] This system has deprived plaintiff and his minor son of their due process rights.

---

[4] It is well-established that federal laws are supreme over the constitution or laws of any state. M'Culloch v. Maryland, 17 U.S. 406 (1819).

II. The Procedures Followed Here Violated The Impartiality Requirement of Federal Law

The EHA requires that state-level reviewing officers be "impartial." 20 U.S.C. § 1415(c).[5] Thus, it would be improper for the Secretary of Education to perform this function even if the Pennsylvania Department of Education _were_ authorized to review the Hearing Officer's decision. This point has been made crystal clear by the courts: employees of the SEA, including the Secretary, are barred from serving in the capacity of reviewing officers.[6]

---

[5] In order to be "impartial," at the minimum, the Hearing Officer cannot be "an employee of such agency or unit involved in the education or care of the child." 20 U.S.C. § 1415(b)(2).

The Secretary's involvement in this case is surprising in light of binding precedent in this jurisdiction prohibiting such action. In Grymes v. Madden, 672 F.2 321, 323 (1982), the Third Circuit held that employees of the Delaware SEA could not be considered impartial as they were "involved in the education ... of the child," however indirectly. Cf. 34 C.F.R. § 300.507(a) (specifically providing that a hearing officer may not be "involved in the education or care of the child.")

---

[6] The legislative history corroborates this view. Sen Conf. Rep. No. 455, 94th Cong., 1st Sess. 49, reprinted in [1975] U.S. Code Cong. & Ad. News 1425, 1502; and see Mills v. Board of Education, 348 F. Supp. 866, 881 (D. D.C. 1972).

Without question, the Pennsylvania Secretary of Education, who exercises extensive control over local school districts, both fiscal and regulatory, is at least equally "involved" in the education of handicapped children as is the Delaware SEA. Thus, Grymes is dispositive of the issue in this case. See also Robert M. v. Benton, 634 F.2d 1139 (8th Cir. 1980); Helms v. McDaniel, 657 F.2d 800, 805 and n. 9 (5th Cir. 1981); Vogel v. School Board of Montrose R-14 School District, 491 F. Supp. 989 (W.D. Mo. 1980) (all involving action on the part of the chief administrative officer of the state's department of education, or the deputy chief administrator).

One recent case found that even officers or employees of local school systems not attended by the child in question, and university personnel who have been involved in formulating state policy regarding the education of handicapped children, are barred from serving as hearing officers. Mason v. Teague, 749 F.2d 652 (11th Cir. 1984).

Thus, review by the Secretary violated the EHA's requirement of "impartiality," and deprived plaintiff of his due process rights.

III. THE COURT SHOULD ORDER DEFENDANTS TO REIMBURSE PLAINTIFF FOR THE COSTS AT LANDMARK

A. Reimbursement Is Allowed Against These Defendants

As the Supreme Court has made clear, this Court's task in this case is to determine whether the state has followed the procedures set out in the EHA, and whether the IEP is reasonably calculated to provide educational benefit to Alexander Muth. Bd. of Educ. v. Rowley, 458 U.S. 176, 206-07 (1982). As demonstrated in the previous sections, the SEA and LEA failed to comply with the procedural requirements of the EHA, and thus should be responsible for the tuition at Landmark School.[7]

Recently, the Supreme Court has made clear that reimbursement of tuition costs is the appropriate remedy for procedural violations. Town of Burlington v. Dept. of Educ., 105 S. Ct. 1996 (1985). This decision affirmed the

---

[7] As for the IEP, the Hearing Officer found that it was not appropriate to meet Robert's needs. This decision was illegally reversed by the Secretary; thus, the Hearing Officer's determination should be given "due weight." Rowley, at 458 U.S. 206.

First Circuit's finding that the procedural errors committed in that case formed the basis for tuition reimbursement. See Township of Burlington v. Dept. of Educ., 736 F.2d 773, 794 (1st Cir. 1984). Thus, given the defendants' use of a procedure outside the bounds of the EHA, there is no question that they should be responsible for Alexander's tuition at Landmark.[8]

---

[8] Although the illegal procedure is mandated by Pennsylvania law, and it was defendant Secretary who illegally reversed the Hearing Officer's determination, defendant School District asked for and received this illegal act. Additionally, under the EHA, defendant School District is responsible for complying with the procedural requirements.

Although this Court seemingly has declined to allow plaintiff to seek reimbursement from the Secretary, Muth v. Central Bucks School District, C.A. 84-2032, Memorandum Opinion and Order (November 19, 1985), in light of the Supreme Court's decision in Burlington, it is clear that reimbursement is available.[9] The EHA provides that this Court is to "grant such relief as the court deems appropriate." 20 U.S.C. § 1415(e)(2). As Burlington makes clear, appropriate relief includes reimbursement for tuition. 105 S. Ct. at 2004-05.

---

[9] Unless reimbursement is allowed against the Secretary, then the SEA will be free to commit unlimited violations of the EHA, without any possibility of reprisal. Given the congressional grant of jurisdiction to the District Courts under the EHA, this obviously would defy logic. Further, it is significant that the stipulation referred to in the Court's Memorandum was entered into by previous counsel. It is respectfully suggested that previous counsel was not familiar with this area of the law. Additionally, that stipulation was entered into prior to the Supreme Court's holding in Burlington, when the right to reimbursement was less clear.

There is no bar to an award of reimbursement against the Secretary. Indeed, in passing the EHA, Congress has abrogated any immunity that the Secretary may have had under the Eleventh Amendment.[10] This holding was most recently reached by the First Circuit in David D v. Dartmouth School District, 775 F.2d 411 (1985).

---

[10] Because plaintiff assumes that the funds used for reimbursement would be Pennsylvania funds, and not the Secretary's personal funds, the issue will be analyzed according to Eleventh Amendment principles.

In David D., the court examined whether Congress effectively overrode the states' sovereign immunity in passing the EHA. In examining that issue, the First Circuit applied the test developed by the Supreme Court last term in Atascadero State Hospital v. Scanlon, 53 U.S.L.W. 4985 (June 28, 1985), and determined that Congress had abrogated that immunity.

In passing the EHA, Congress has used its powers under Section 5 of the Fourteenth Amendment to waive this immunity. This is unequivocally clear from the plain language of the statute: "It is in the national interest that the Federal Government assist the state and local efforts to provide programs to meet the needs of handicapped children in order to assure equal protection of the law." 20 U.S.C. 1400(b)(9) (emphasis added). This distinguishes the EHA from the Rehabilitation Act, which was at issue in Atascadero, since the Rehabilitation Act contains no such language. Additionally, the Rehabilitation Act does not give states the option of participating in a voluntary program that entails a grant of federal funds, as does the EHA. 20 U.S.C. §§ 1411-12.

Additionally, the First Circuit looked to the Supreme Court's decision in Smith v. Robinson, ___ U.S. ___, 104 S. Ct. 3457, 3486 (1984), which held that the EHA was designed to implement the Fourteenth Amendment's guarantee of equal protection. It should be noted that his Court was the first to hold that a handicapped child's right to ar appropriate education was grounded in the Fourteenth Amendment. Pennsylvania Ass'n for Retarded Citizens v.

Commonwealth, 334 F. Supp. 1257 (1971), and 343 F. Supp. 279 (1972).[11] The First Circuit's decision is only the latest in a line of cases uniformly holding that the EHA's passage abrogated the states' immunity under the Eleventh Amendment. In Department of Education v. Katherine D., 727 F.2d 809 (1984), the Ninth Circuit held similarly. Indeed, in that case, the Court held that an award of tuition reimbursement against the state should be granted. Dept. of Educ. v. Katherine D., 727 F.2d 818. In accord is the Fifth Circuit's decision in Crawford v. Pittman, 708 F.2d 1028, 1039 (1983), which explictly held that the EHA was enacted "under section five of the fourteenth amendment."[12]

---

[11] This case and Mills v. Board of Educ., 348 F. Supp. 886 (D. D.C. 1972) were the impetus for passage of the EHA, and supplied many of its procedural protections. Smith v. Robinson, 104 S. Ct. at 3468; Rowley, 458 U.S. at 193-94.

Abrogating the Eleventh Amendment immunity also fits the statutory scheme of the EHA. Under that scheme, it is the state that must submit an annual plan to the Federal Government, 20 U.S.C. § 1413, and it is the state that receives the funds under the EHA. Id. at § 1411. Furthermore, it is the state that must assure compliance with the Act, and therefore, basically controls the child's education. In light of the explicit grant of jurisdiction to the District Courts, it would be contrary to all logic to interpret the EHA to bar suits against the states. Indeed, such an interpretation would completely vitiate the procedural protections of the EHA, which are its very heart. Rowley, 458 U.S. at 205.

---

[12] District Courts in Kerr Center Parents Ass'n. v. Charles, 581 F. Supp. 166 (D. Ore. 1983) and Parks v. Pavkovich, 536 F. Supp. 296 (N.D. Ill. 1982) are in agreement.

B. The Court Should Order Reimbursement In This Case

Because the EHA violations here have deprived Alexander Muth of his right to a free, appropriate education, and have deprived him of his procedural protections under the EHA, this Court should exercise its equitable powers and order reimbursement for the tuition at Landmark School, an appropriate placement.

Under the facts here, the Court should order reimbursement for tuition at Landmark. As demonstrated, the only valid administrative decision in this case is the Hearing Officer's October 31, 1983 decision. Plaintiff's Exhibit 1. All subsequent actions, including the Secretary's purported decision, the hearing after remand, and the Secretary's second decision, were products of illegal conduct and are void. Plaintiff's Exhibits 2-4. When one winnows the permitted conduct from the illegal, one is left with a situation that closely approximates that in Burlington. As in that case, there was an administrative decision in the parent's favor, and that decision required that the parent take action when the school district did not.

The Hearing Officer found that the program offered to Alexander Muth, in which he actually was placed at the start of the 1983-84 school year, was inappropriate. Thus, the defendant School District had not provided him with a free appropriate education. Under Burlington, the parent had the right -- and indeed the obligation -- to seek an appropriate placement for his son. The First Circuit held, in a portion of Burlington unreviewed by the Supreme Court, that the parent has the right to rely on the decision from the due process hearing. 736 F.2d at 799. Mr. Muth did exactly that. Moreover, the defendants, by following a clearly illegal procedure,[13] allowed the Hearing Officer's decision to become final. To this day, no appeal pursuant to 20 U.S.C. § 1415 has been filed by any of the defendants in this case. They are thus barred from contesting the Hearing Officer's determination in this forum.

---

[13] By the time that the defendant School District filed its exceptions and defendant Secretary purported to remand to case back to the Hearing officer, Grymes v. Madden had been the law in this Circuit for over a year.

As in Burlington, the only possible appropriate placement for Alexander is Landmark. Because the education must be "free" as well as "appropriate," Burlington, 104 S. Ct. at 2004, it is clear that defendants should fund Landmark for the 1983-84 school year.

Additionally, Landmark must be considered Alexander's "current placement," 20 U.S.C. 1415(e)(3), and defendants are required to maintain that placement. Therefore, defendants should be required to reimburse plaintiff for all tuition and other costs, and to keep Alexander at Landmark.

Ordering reimbursement at this stage of the proceedings comports with the Supreme Court's decision in Burlington. As the Court recognized, reimbursement is an "equitable" remedy. 104 S. Ct. at 2005. In this case, the equities strongly militate towards reimbursement. The procedural safeguards are the backbone of the EHA, and defendants' violations here have turned the process into a charade. See e.g., McKenzie v. Smith, 771 F.2d 1527, 1532 (D.C. Cir. 1985) ("The underlying assumption of the Act is that to the extent procedural mechanisms are faithfully employed, handicapped children will be afforded an appropriate education.")

Reimbursement effectuates the policy behind the EHA. It rectifies the procedural errors, thus having a deterrent effect, while assuring that Alexander Muth receives his due -- a free, appropriate public education.

CONCLUSION

Because there is no genuine issue of material fact remains in dispute, and plaintiff has established his entitlement to judgment as a matter of law, this Court should grant plaintiff's motion.

Respectfully submitted,

/s/Matthew B. Bogin

BOGIN & EIG
1630 Connecticut Ave., N.W.
Suite 701
Washington, D.C. 20009
(202) 667-7373

Counsel for Plaintiff

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. : CIVIL ACTION
individually and on
behalf of His minor child
ROBERT ALEXANDER MUTH, :
Plaintiffs

v.

MARGARET A. SMITH, et al,
Defendants : No. 84-2032

DEFENDANT SMITH'S MEMORANDUM OF LAW IN OPPOSITION TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

PROCEDURAL POSTURE

In a Memorandum Opinion of November 18, 1985, this Court granted plaintiff permission to file a Second Amended Complaint. As to the Secretary of Education, Margaret A. Smith, the Court has permitted the plaintiff to proceed on two claims: first, plaintiff's allegation in Count I that the Secretary's participation in the due process hearing procedure violates plaintiff's rights pursuant to the Education of All Handicapped Children Act of 1975 (hereafter "EHCA") and second, that the delay in the hearing process has violated plaintiff's rights under that statute as well. The Court precluded plaintiff from raising these claims under the Due Process Clause of the Fourteenth Amendment and further precluded plaintiff from raising the issue of reimbursement of tuition expenses as to the state defendant.

Plaintiff has filed a Motion for Summary Judgment, defendant Smith's response to that Motion will be limited to those claims which this Court has permitted plaintiff to pursue.

ARGUMENT

I. PENNSYLVANIA'S DUE PROCESS HEARING SCHEME CONFORMS WITH THE PROVISIONS AND GUIDELINES OF THE EDUCATION OF ALL HANDICAPPED CHILDREN ACT OF 1975.

A. Statutory and Regulatory Due Process Hearing Scheme

In 1975, Congress enacted the Education of All Handicapped Children Act, 20 U.S.C.A. §§1411-1420. This Act provides federal funding for the education of handicapped children to states who meet the Act's requirements. The Act does not specify the nature of the educational programs for qualifying states but relies, instead, on procedural safeguards which involve parents in educational placement decisions. The Act outlines procedures whereby parents may challenge the appropriateness of their child's educational program.

Section 1415 of the Act establishes procedural safeguards that must be followed by any state or local agency that receives assistance under the Act. It is noteworthy that subsection (b)(1) of §1415 begins with the language: "The procedures required by this section [§1415] shall include, but shall not be limited to ...." The section then proceeds to enumerate review procedures. Subsection (b)(2) requires that parents be given the opportunity for an "impartial due process hearing" at either the state-educational-agency level or the local level as determined by state law. If the hearing is conducted at the local level, then the party aggrieved may appeal to the state educational agency for an impartial review and an independent decision.

Section 1415(c). Subsection (e)(1) requires that the decision at the local level be final unless appealed to the state agency, and that the decision of the state agency be final unless a civil action is brought in accordance with §1415(e)(2).

Pennsylvania's due process hearing procedures, 22 Pa.Code §13.31 et seq. substantially conform with EHCA requirements by providing the parent who wishes to challenge his child's educational program with (1) a placement conference with the school (2) a full hearing before a hearing officer and (3) the opportunity to appeal the hearing officer's decision to the Secretary of Education, 22 Pa.Code §13.32(2)(24).

B. Pennsylvania's Initial Due Process Hearing Is A Local Agency Hearing Resulting In A Final Decision

Plaintiff's challenge to Pennsylvania's due process hearing scheme is based on two flawed and unwarranted assumptions: first, plaintiff characterizes the initial hearing as a state-agency hearing rather than a local agency hearing, and second, he characterizes the hearing examiner's report as that of a special master whose findings are not final but a mere recommendation to the Secretary. Turning to the first assumption regarding the nature of the initial hearing, plaintiff, relies on language in 22 Pa.Code §13.32(2), which provides that due process hearings are to be conducted by "the Secretary or the designee of the Secretary". Plaintiff himself admits, Memorandum of Law in Support of Motion for Summary Judgment at p. 5, that "[i]n practice, the Secretary does not personally conduct due process hearings; however, the Secretary designates individuals to conduct the hearings and then hears appeals from the decisions of these designees".

Focusing on the practice, plaintiff appears to argue that the mere designation of a hearing examiner by the Secretary makes the hearing a state agency hearing. That is simply not so, because the obligation to designate such examiners is imposed on the Secretary not only by Pennsylvania regulations but by federal regulations implementing the EHCA which require that the state agency maintain a list of persons who shall serve as hearing officers. 45 C.F.R. 121a. 507 (1979).

Maintaining such a list is the Secretary's only connection with the initial hearing procedure, specific assignment of hearing examiners is the responsibility of the Technical Assistance Group for the Right to Education, a special project funded by the Pennsylvania Department of Education but administered, managed and supervised by the Central Susquehanna Intermediate Unit. [See Affidavit of Linda O'Connor, p. 1, incorporated herein by reference and attached as Exhibit II to Defendant Wilburn's Motion for Summary Judgment.] Moreover, it is the local educational agency, the school district, which actually conducts the initial hearing. The school district receives the hearing request, schedules hearings, notifies parents of all schedules and holds the hearing in the school district. To summarize, at the initial due process hearing stage, all contacts occur between parents and the local educational agency with the Secretary's involvement limited to maintaining a list of impartial hearing examiners pursuant to federal and state regulations. Defendant submits that all indicia which characterize this initial due process hearing mark it as a local agency hearing before an impartial hearing examiner.

Addressing the second assumption upon which plaintiff's claim rests, that the report of the hearing examiner is not a final report but merely a recommendation to the Secretary, the Pennsylvania regulations clearly provide that the decision of the hearing officer may be appealed to the Secretary. 22 Pa.Code §13.32(24). Aside from the obvious implications of the language emphasized, what occurs in practice and what occurred in plaintiff's situation, is that the examiner made a decision which would have been final if neither party had appealed. The existence of the option to appeal does not render the examiner's decision a master's report reviewable by the Secretary - plaintiff's tortuous view of the process ignores the language of the regulations as well as the actual practice.

It is only if, and when, either party decides to appeal the hearing examiner's decision that the state agency level review is made by the Secretary of Education.

This process conforms precisely with the provisions in 20 U.S.C. §1514(c).[1]

Once plaintiff has erroneously characterized the hearing and review process, he analyzes the due process procedure in light of Helms v. McDaniel, 657 F.2d 800 (5th Cir. 1981) and Monahan v. State of Nebraska, 491 F.Supp. 1074 (1980). Both of those cases are clearly distinguishable, on the facts, from the case at bar.

---

[1] This subsection provides:

> (c) If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

In Helms, the Fifth Circuit Court of Appeals upheld a two-tiered local agency hearing but found statutorily impermissible a similar two-tier state level hearing procedure. The appellate court pointed out that where the findings of the state reviewing officer are treated as findings of a special master reviewable before a state board, the state board fails to comply with the finality requirement of 20 U.S.C. §1415(e).

In Monahan, the court was faced with a due process hearing at the state agency level: however, the hearing officer's decision was submitted to the Commissioner of Education who had the discretionary authority to accept, reject, or modify the decision of the hearing officer. The court there held that such discretion in the Commissioner of Education conflicts with the federal requirement that the decision made in the due process hearing shall be final except for judicial review.

It is defendant Smith's position that Helms and Monahan are factually distinguishable from the case at bar. Beyond the factual distinction, and assuming without admitting that Pennsylvania does indeed have a two-tiered state agency level procedure, defendant believes that the better view has recently been enunciated by the Supreme Court of Rhode Island when it stated:

> A careful examination of §1415 reveals that the requirements enunciated therein establish a bare minimum of protective safeguards. This interpretation of the statute is mandated by the language "shall include, but shall not be limited to" appearing at the beginning of §1415.

Congress clearly contemplates a certain amount of flexibility for the states in meeting the requirements of the act, provided the state protections afforded handicapped children do not fall below the level set by Congress. It is axiomatic that a state may therefore provide greater protection without running afoul of the federal framework. The Rhode Island statutory scheme at issue here[2] affords the handicapped child and his or her parents greater protection than the act requires. It also embodies an important public policy decision that the resolution of most education-related controversies in this state is best accomplished by a three-level review process. Certainly the federal act never anticipated that handicapped children would

---

[2] The Rhode Island statutory scheme provided for a local hearing before an impartial hearing officer with a right to appeal to the Commissioner of Education whose decision was, in turn applicable to the Board of Regents.

> be denied the rights enjoyed by non-handicapped children under state law. ... Although it is true ... that prompt decisions are essential in this area, we decline to favor speed over the full protection of due process rights.

In re Michael C. and The Coventry School Department, et al, 487 A.2d 495, 499 (1985).

Defendant believes that the EHCA, taken as a whole, affords the state much flexibility in implementing the procedural safeguards mandated by §1415. As the Court stated in Eberle v. Board of Public Education, 444 F.Supp. 41, 43 (D.C. Pa. 1977):

> These subsections provide the basic structure for the establishment of a review procedure by the states. More elaborate due process guarantees may be instituted by the individual states.

The legislative history supports this concept of flexibility; in their report on the 1975 amendments, the conferees reported that they did "not intend that this provision [§1415] will require changes in existing arrangements where due process hearings are conducted at the level of the State educational agency rather than at the local level." Statement of Senator Williams, Congressional Record-Senate, for November 19, 1975 at 37415.

Evidently, while the drafters of the act felt that further review was unnecessary when the due process hearing was conducted at the state level, they certainly did not preclude it.

The legislators' interest in finality is clearly motivated by an interest in resolving disputes over individual education plans without delay. It makes little difference whether the two-tier procedure consists of local hearing with state review or whether the two-tier procedure is state hearing with state-level review. Defendant believes that this is the relevant focus and one which has been ignored by the plaintiff.

C. The Secretary of Education Is An Appropriate Review Officer

Plaintiff contends that Pennsylvania's Secretary of Education is precluded from participating in the due process procedure because the Secretary is not an "impartial" reviewing officer as required by 20 U.S.C. §1415(c). Plaintiff relies on Grymes v. Madden, 672 F.2d 321 (3d Cir. 1982) which held that statutory term "impartial review" precluded the use of Delaware State

Board employees from participating as review officers. Plaintiff's reliance on Grymes is clearly inappropriate for the simple reason that the Secretary of Education is a high public official whose gubernatorial appointment distinguishes her from "employees" of the Board. See Brandon v. Wisconsin Department of Public Instruction, 595 F.Supp. 740 (1984). Similarly, Robert M. v. Benton, 634 F.2d 1139 (8th Cir. 1980) is unpersuasive because there too, the hearing officer whose impartiality was challenged was an employee of the State Board of Public Instruction.

Finally, plaintiff's challenge to the Secretary's power to review the decision of the hearing officer must fail because he has waived his right to raise this issue in federal court through his silence during the administrative process. Plaintiff has offered no excuse for this failure and should now be barred from litigating the issue in this forum. As the Supreme Court of the United States has stated:

> Orderly procedure and good administration require that objections to the proceedings of an administrative agency be made while it has an opportunity for correction in order to raise issues reviewable by the courts.

United States v. Tucker Truck Lines, 344 U.S. 33, 37; 73 S.Ct. 67, 69 (1952). See also, Cain v. Yukon Public School District, 775 F.2d 15, 20 (10th Cir. 1985); Colin K. by John K. v. Schmidt, 715 F.2d 1 (1st Cir. 1983); Savka v. Commonwealth of Pennsylvania, 403 A.2d 142 (Cmwlth. Ct. 1979).

D. Any Delay In The Administrative Procedure Is Either Caused By Plaintiff Or Non-prejudical To Plaintiff

Defendant Smith joins in, and incorporates by reference, the Memorandum of Law in Support of Defendants' Central Bucks School District and Dr. Thomas L. Newman's Answer to Motion for Summary Judgment. Specifically, defendant Smith relies on the affidavits submitted in support of school district defendants as they relate to the issue of delay in the due process procedure.

Defendant Smith submits that the affidavits of N. Robert Laws, Blum-Moore Reporting Services and Joanne D. Sommer, Esquire show that the greatest delay in the procedure was caused by plaintiff himself and that he has not alleged any prejudice from any delays caused by defendant here.

E. Defendant Smith Objects To the Exhibits Attached To Plaintiff's Motion For Summary Judgment On The Basis That They Are Inadmissable As Hearsay.

CONCLUSION

For all the reasons advanced above, defendant Smith requests that the Court deny plaintiff's Motion for Summary Judgment and requests that this submission be regarded as a cross-motion for summary judgment.

LEROY S. ZIMMERMAN
ATTORNEY GENERAL

BY: /S/MARIA PARISI VICKERS
SENIOR DEPUTY ATTORNEY GENERAL

OFFICE OF ATTORNEY GENERAL
206 State Office Building
Philadelphia, PA 19130
Telephone: (215) 560-2402

[Certificate of Service omitted.]

MEMORANDUM, OPINION AND ORDER

OF JUNE 2, 1986

[Located in Petition Appendix 83a]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. : CIVIL ACTION
individually and on
behalf of His Minor Child
ROBERT ALEXANDER MUTH, :
Plaintiff

v.

MARGARET A. SMITH, et al,
Defendants : No. 84-2032

DEFENDANT SECRETARY SMITH'S TRIAL MEMORANDUM

I. FACTUAL AND PROCEDURAL BACKGROUND

By Memorandum and Order of March 18, 1985, this Court held that the Eleventh Amendment bars plaintiff's claim for retroactive monetary relief against defendant Secretary of Education[1] and left open the question of whether injunctive relief would be appropriate.

---

[1] Secretary Robert C. Wilburn, sued only in his official capacity, was the original named defendant; he was succeeded by Secretary Margaret A. Smith who, as of August 1, 1986 has been succeeded by Acting Secretary D. Kay Wright.

Plaintiff was subsequently permitted to file a second amended Complaint in which he was, by Memorandum Opinion of November 18, 1985, permitted to raise two issues against the Secretary of Education: (1) whether the Secretary of Education's involvement in the due process hearings violates plaintiff's due process rights under the Education for All Handicapped Children Act [EHA] 20 U.S.C. §1401 et seq.; and (2) whether the delays in the due process procedure violate plaintiff's rights under the EHA. The Court did not permit plaintiff's claims as based on the Fourteenth Amendment and expressly precluded a claim which sought tuition reimbursement from the State.

By Memorandum Opinion and Order of June 2, 1986, the Court held that Pennsylvania's administrative procedures contravene federal law. The court did not resolve the issue of tuition reimbursement without first holding a hearing to determine whether the I.E.P. the School District had proposed would have provided plaintiff with an appropriate free education.

The Court has invited further briefing from the Commonwealth on whether the Eleventh Amendment presents a bar to money damages against the Secretary of Education.

II. ARGUMENT

JURISDICTION OVER THE SECRETARY OF EDUCATION IS BARRED BY THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The Eleventh Amendment provides that:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity commenced or prosecuted against any one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

The United States Supreme Court has consistently interpreted the Eleventh Amendment to preclude suits against a state in federal court, by citizens of that state or other states. Atascadero State Hospital v. Scanlon, ___ U.S. ___, 105 S. Ct. 3142 (1985); Pennhurst State School and Hospital v. Halderman, ___ U.S. ____, _____, 104 S. Ct. 900, 906 (1984); Edelman v. Jordan, 415 U.S. 651, 662-663, 94 S. Ct. 1347, 1355 (1974); Employees v. Department of Public Health and Welfare, 411 U.S. 279, 93 S. Ct. 1614 (1973); Parden v. Terminal R. Co., 377 U.S. 184, 84 S. Ct. 1207 (1964);

Hans v. Louisiana, 134 U.S. 1, 10 S. Ct. 504 (1890).

The Eleventh Amendment is applicable to suits seeking money damages, Edelman, supra, as well as suits seeking equitable relief, Alabama v. Pugh, 438 U.S. 781, 98 S. Ct. 3057 (1978).

A state may consent to suit against it in federal court, but Pennsylvania has not done so. In Laskaris v. Thornburgh, 661 F.2d 23, 25 (3d Cir. 1981), the United States Court of Appeals stated that pursuant to 42 Pa. C.S. §8521(b) "Pennsylvania has specifically withheld consent." In absence of consent, a suit against the state or one of its agencies is proscribed by the Eleventh Amendment. Pennhurst, 104 S. Ct. at 908.

The Eleventh Amendment is a complete bar to suit against the Commonwealth of Pennsylvania officials who are sued, as here, in their official capacities.

In Brandon v. Holt, 469____ , 105 S. Ct. 873, 878 (1983), the Supreme Court distinguished suits against governmental officials in their official capacity. The Court referred to Monell v. New York City Department of Social Services, 436 U.S. 658, 690, n. 55, 98 S. Ct. 2018, 2035, n. 55 (1978):

> [O]fficial capacity suits generally represent only another way of pleading an action against an entity of which an officer is an agent.

When the state receives notice and an opportunity to respond, as in this case, an official capacity suit is, in all respects, to be treated as a suit against the state and any recovery of damages is against the state itself.

Kentucky v. Graham, _____ U.S. _______, 105 S. Ct. 3099, 3105 (1985).

The Supreme Court, however, has recognized that a suit challenging the constitutionality of a state official's action is not an action against the State. Ex Parte Young, 209 U.S. 123 (1908). Although the Supreme Court has not decided whether prospective injunctive relief may be granted against state officials for violations of federal statutory law, Pennhurst, 104 S. Ct. 900 at n. 13,[2] retroactive monetary relief is barred by the Eleventh Amendment. Edelman v. Jordan, supra 415 U.S. at 666-667.

---

[2] Edelman v. Jordan, supra, is not to the contrary. In Edelman, the state conceded liability for prospective relief. 415 U.S. at 664.

Applying these principles to this case, it is clear that the Eleventh Amendment bars this suit against the Secretary of Education.

Plaintiffs state that the Secretary of Education is being sued in his official capacity only. (Complaint, Para. 5a). Clearly the plaintiffs are looking to the Commonwealth and not the Secretary personally for payment of damages. Thus, the real party in interest is not the Secretary but the Commonwealth of Pennsylvania, and the Eleventh Amendment bars the award of any money damages against the Commonwealth. See Hark v. School District of Philadelphia, 505 F. Supp. 727 (E.D. Pa. 1980).

Plaintiffs are relying on the argument that Congress abrogated the Commonwealth's Eleventh Amendment immunity by passing the EHA pursuant to §5 of the Fourteenth Amendment.

While plaintiff is correct in pointing out the Congress may, by legislating to enforce constitutional provisions, abrogate the states' Eleventh Amendment immunity from suits for damages, see Fitzpatrick v. Bitzer, 427 U.S. 445, 456, 96S. Ct. 2666, 2671 (1976); Parden v. Terminal Railway, 377 U.S. 184, 192, 84 S. Ct. 1207, 1212 (1964), there must be unequivocal evidence of such abrogation before it can be assumed to exist. The Supreme Court has generally required such congressional intent to be either explicit in the statute or plainly evident from legislative history. Quern v. Jordan, 440 U.S. 332, 345, 99 S. Ct. 1139, 1147 (1979). In Quern, the Court re-affirmed its holding in Edelman, supra, p. 3, that the Civil Rights Act of 1871, 42 U.S.C. §1983 et seq., does not abrogate the States' Eleventh Amendment immunity and stated:

> There is no question that both the supporters and opponents of the Civil Rights Act of 1871 believed that the Act ceded to the Federal Government many important powers that previously had been considered to be within the exclusive providence of the individual states.
>
> [N]either logic, the circumstances surrounding the adoption of the Fourteenth Amendment, nor the legislative history of the 1871 Act compels, or even warrants, a leap from this proposition to the conclusion that Congress intended by the general language of the Act to overturn the constitutionally guaranteed immunity of the several States.
>
> . . .
>
> Given the importance of the States' traditional sovereign immunity, if in fact the Members of the

> 42nd Congress believed that §1 of the 1871 Act overrode that immunity, surely there would have been lengthy debate on this point and it would have been paraded out by the opponents of the Act, along with the other evils that they thought would result from the Act. Instead, §1 passed only with limited debate and not one Member of Congress mentioned the Eleventh Amendment or the direct financial consequences to the States of enacting §1. We can only conclude that silence on the matter is itself a significant indication of the legislative intent of §1.

at p. 342-343.

Plaintiff's contention that in enacting the EHA, Congress abrogated the states' constitutionally granted immunity must satisfy stringent criteria recently re-affirmed by the Court in Atascadero State Hospital v. Scanlon, supra, p. 3. There, the Supreme Court refused to find such abrogation of immunity in

Congressional passage of the Rehabilitation Act, 29 U.S.C. §794 by stating:

> In making this argument, respondent relies on the pre- and post-enactment legislative history of the Act and inferences from general statutory languages. To reach respondent's conclusion, we would have to temper the requirement, well established in our cases, that Congress unequivocally express its intention to abrogate the Eleventh Amendment bar to suits against the States in federal court. [cites omitted]. We decline to do so and affirm that Congress may abrogate the States' constitutionally secured immunity from suit in federal court only by making its intention unmistakenly clear in the language of the statute.

at 105 S. Ct. 3147

. . .

> Congress' power to abrogate a State's immunity means that in certain circumstances the usual constitutional balance

> between the States and Federal Government does not obtain. "Congress may, in determining what is 'appropriate legislation' for the purpose of enforcing the provisions of the Fourteenth Amendment, provide for private suits against states or state officials which are constitutionally impermissible in other contexts." [cite omitted] In view of this fact, it is incumbent upon the federal courts to be certain of Congress' intent before finding that federal law overrides the guarantees of the Eleventh Amendment. The requirement that Congress unequivocally express this intention in the statutory language ensures such certainty.

at 105S. Ct. 3148.

What plaintiff's argument overlooks is that simply because Congress has the power, in legislating pursuant to the Fourteenth Amendment, to override Eleventh Amendment immunity, it does not mean that it exercised such power in enacting EHA. In fact, all indications are to the contrary: there is no reference either in the language of the statute itself or in the legislative history that Congress intended this statute to abrogate rights reserved to the States by another constitutional amendment.

Plaintiff relies on David D. v. Darmouth School Committee, 775 F.2d 411 (1st Cir. 1985) where the Court held that EHA effectively abrogates the sovereign immunity of states. There, the appellate court acknowledged its obligation to follow the principles enunciated by the Supreme Court in Atascadero that "congress must express its intention to abrogate the Eleventh Amendment in unmistakable language in the statute itself." and found the requisite clarity in the following statutory provision:

> It is in the national interest that the Federal Government assist the State and local efforts to provide programs to meet the needs of handicapped children in order to assure equal protection of the law.

[emphasis in original]. 775 F.2d at 421.

It is on this premise, that the statute is intended to assure the equal protection of the law, that this appellate court bases its decision to strip the states of a fundamental, constitutionally protected prerogative. Defendant suggests that such a holding, while paying lip service to the teachings of the Supreme Court, has blithely ignored them. In dissenting from his colleagues, Judge Torruella acknowledged the binding provisions of the Eleventh Amendment and stated:

> ... I believe that the present situation under the Education for the Handicapped Act, 10 U.S.C. §1401 et seq., is indistinguishable from that in Atascadero under the Rehabilitation Act, and as in Atascadero, there is lacking unmistakably clear intention in the language of this legislation to submit the Commonwealth of Massachusetts to suit in federal court...

775 F.2d at 425.

Defendants urge the Court here to adopt, instead, the more reasoned holding of the Eighth Circuit in Miener v.State of Missouri, 673 F.2d 969 (8th Cir. 1982) where the Court rejected the contention that the passage of the EHA abrogates states' immunity.

Relying on the clear guidelines laid down in Quern v. Jordan, supra, this Court held that an intention to sweep away the immunity of states cannot be inferred from the mere fact that the Education Act was passed pursuant to the Fourteenth Amendment but that such an intent must be found in express, formal abrogation language or persuasive legislative history. In Miener the Court went on to dismiss all causes of action for damage relief against state officials, including relief in the form of compensatory educational services.

Plaintiff also relies on Department of Education State of Hawaii v. Katherine D., 727 F.2d 809 (9th Cir. 1983) where the court held that the state waived its Eleventh Amendment immunity (1) by participating in a federally funded and regulated program and (2) because it is amenable to suit by the terms of §1415(e)(2).[3]

Simply because the EHA authorizes suit in federal court, it does not follow that suit may be brought against a state and its agencies in federal court. While a state may consent to a suit in federal court, "the state's consent must be unequivocally expressed." Pennhurst State School and Hospital, supra. A state does not waive its immunity to suit in federal court by mere participation in a federal funding program. Atascadero, supra, at 105 S.Ct. 3150; Florida Department of Health and Rehabilitative Services v. Florida Nursing Home Association, 450 U.S. 147, 150 (1981). Rather, waiver will be found "only where stated by the most express language or by such overwhelming implications from the test as (will) leave no room for any other reasonable construction." Edelman v. Jordan, supra, 415 U.S. at 673.

---

[3] Section 1415(e)(2) of the EHA states:

> [a]ny party aggrieved by the findings and decisions made under subsection (b) (providing for administrative review) ... shall have the right to bring a civil action ... in any State court of competent jurisdiction or in a district court of the United States...

CONCLUSION

Because the language of the EHA does not expressly say that states or their agencies can be sued in federal court at all, let alone for damages, Pennsylvania did not waive its Eleventh Amendment immunity. Accord Miener v. State of Missouri, supra, 673 F.2d at 981.

LEROY S. ZIMMERMAN
ATTORNEY GENERAL

/S/ Maria Parisi Vickers
SENIOR DEPUTY ATTORNEY GENERAL

Andrew S. Gordon
CHIEF DEPUTY ATTORNEY GENERAL
CHIEF, LITIGATION SECTION

OFFICE OF ATTORNEY GENERAL
206 State Office Building
Philadelphia, PA 19130
Telephone: (215) 560-2402

[Certificate of Service omitted.]

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. : CIVIL ACTION
individually and on
behalf of his minor child,
ROBERT ALEXANDER MUTH :

v.

CENTRAL BUCKS SCHOOL
DISTRICT
and
DR. THOMAS L. NEWMAN
Superintendent of the
Central Bucks School
District : No. 84-2032

Trial Transcript of August 11, 1986

P. 6, l. 1 to p. 7, l. 19

MS. SOMMER: Would Your Honor like an opening statement?

THE COURT: If you wish.

MS. SOMMER: Your Honor, this case involves a program in placement for a learning disabled child, Alexander Muth. Alexander first entered the school, the Central Bucks School

District, approximately 1980. He had spent the first years of his education in South America, in Colombia, South America, where most of his education was conducted in Spanish. Prior to entering the Central Bucks School District, Alex was tested by Doctor Thomas Atkins, and at that time a learning disability was diagnosed by Doctor Atkins. When Alex entered the Central Bucks School District, he was placed in a learning disabilities classroom. He attended this classroom until September of 1983.

By way of background, Your Honor, in March of 1983, it was -- a multi-disciplinary team meeting was held. At that time it was decided that because of some concerns Alexander had about not feeling normal and because of some of the progress that he had made, it was recommended that a mainstreaming program be instituted for two major subjects, that being English and science. Alex was mainstreamed into those two subjects in March of 1983. It was done on a diagnostic basis, and as a result, in June of 1983 another multi-disciplinary team meeting was convened with the parent to evaluate Alex's progress in the program. At that time, the Central Bucks School District multi-disciplinary team recommended that Alex's mainstreaming in those two major subjects be discontinued and that he be placed in a self-contained learning disabilities classroom for his eighth grade year, which would have been the 1983-84 school year.

Immediately after the June meeting, a due process hearing was requested and it was -- it is that process that began the reason we're here today. Because the due process procedures were ongoing, no Individualized Educational Program plan was developed in June of 1983 for Alex. A program for the 1983-84 school year was developed after the Secretary of Education instructed the Central Bucks School District to begin preparing an IEP, and that IEP was prepared in March of 1984, and some revisions were made in April of 1984 after a meeting with Mr. Muth.

The Central Bucks School District will present to the Court the reasons that we believe the IEP that we prepared for the 1983-84 school year is appropriate.

P. 11, l. 24 to p. 17, l. 21

BY MS. SOMMER:

Q. Mr. Talerico, when did you first become involved with Alexander Muth?

A. I believe it was in November of 1982.

Q. And how was it that you became involved?

A. Alex was having some difficulties in the other resource room classroom, as well as feelings of being stigmatized by being in that self-contained resource -- classroom.

Q. When you talk about a self-contained classroom, to what are you referring?

A. Alex was in one classroom for the major subject areas of English language arts, math, science, social studies and reading, and he only left that classroom for electives.

Q. Was that a learning disabilities classroom?

A. Yes, it was.

Q. When you mentioned that Alexander felt he was being stigmatized, in what way?

A. He wished to participate more in the mainstream of Lenape Junior High School. He wanted to be in other classes, core classes with the students.

Q. Was there a multi-disciplinary team meeting held to discuss the possibility of mainstreaming Alex in March of 1983?

A. Yes, there was.

Q. Can you tell the Court what a multi-disciplinary team is?

A. At that meeting, there was a psychologist, the educational evaluator of the school district, the guidance counselor, the two special education teachers, and the principal, as well as the supervisor of Special Education and the director of Pupil Personnel Services at Central Bucks.

Q. Had most of these people been involved with Alex during the school year.

A. Yes, they had. Yes.

Q. What was the purpose of the multi-disciplinary team meeting?

A. It was to decide on a course of action so that Alex could be -- his program could be changed, so that he could be more into the mainstream of Lenape Junior High School.

Q. Was Mr. Muth present at that meeting?

A. I believe he was.

Q. Was a decision made regarding mainstreaming Alex from March of '83 to the end of '83 -- of the '82-83 school year?

A. Yes. We decided on a trial period where Alex would be mainstreamed in English and in science, would attend those regular mainstream classes. At that time he would also come to my room for reading and math, and I believe there were two additional support periods added to that schedule that he would come to my room for support.

Q. Was the mainstreaming program instituted?

A. Yes, it was. It was done on a trial basis from March until June.

Q. During the time period from March until June, did you have the opportunity to work with Alex?

A. Yes, I did.

Q. And did you have the opportunity to monitor his progress in the mainstreamed classrooms?

A. Yes. I had sometimes daily or weekly meetings with his mainstream teachers.

Q. Can you describe the -- how the mainstream program worked for Alex?

A. Initially Alex was motivated in the classroom, and for the first week, I think, maybe the first two weeks things went very well. But then the demands of the mainstream classroom, the structure of the mainstream classroom, he had trouble working in the environment. He was getting behind in assignments.

I'm not sure if at this time he was experiencing the frequency of absences that he had during the school year, but he was getting behind in work. He was getting frustrated. There were some disruptive comments, et cetera, made in the classroom. He had to be reprimanded. And there was overall conflict was developing between himself and some students, as well as the teachers.

Q. As a result of the trial period of mainstreaming, in June of 1983 was another multi-disciplinary team meeting convened to discuss Alexander?

A. Yes, it was.

Q. Do you know who was present at that meeting?

A. I believe the same people who were present at the previous meeting that was held in March, and we had some written reports from the mainstream classroom teachers.

Q. Were recommendations made to the parent at that time regarding Alex's program for the upcoming '83-84 school year?

A. Yes. Given Alex's difficulty in the mainstream classroom, we recommended that Alex be returned to the resource room program for science and English, and that way he would then be working with myself and the other special education teacher the following year.

Q. At the time of the June conference, was an IEP developed for Alex?

A. No, it wasn't. We had decided that we would develop the IEP in September when school was about to reconvene.

Q. Did Alex ever attend your class in the '83-84 school year?

A. No, he did not.

Q. Is it fair to say then in September of 1983, you did not have the opportunity to prepare an IEP for the '83-84 school year for Alex.

a. No.

Q. Did you have the opportunity at some later time to prepare an IEP for Alex?

A. Yes. In I believe it was February of '84, we prepared an initial IEP, an then revised it I believe it was April of that year.

Q. I show you a document that has been already admitted into evidence as Central Bucks 12. Can you identify this document?

A. Yes.

Q. What is it?

A. It's the IEP that was developed by myself and Miss Tolson, the Central Bucks education evaluator.

Q. Now, Mr. Talerico, what was the proposal for the 1983-84 school year in terms of placement?

A. In terms of placement, Alex would be in the resource room program. He would not be in the mainstream.

Q. When you talk about a resource room, what are you -- to what are you referring?

A. Well, it is a classroom for children with learning disabilities. In the resource room program, the student had the ability to move between the two different learning disability classrooms. There are some self-contained students and they still do move. The resource room program follows the IEP in trying to develop an educational program for a child in that placement.

Q. For the 1983-84 school year, how many learning disabilities teachers were there?

A. There were two at Lenape Junior High School.

Q. And approximately how many students would have been in the eighth grade learning disabilities classroom?

A. I believe somewhere between five and -- between any other class period, there could be anywhere between five and ten.

Q. In addition to the two teachers for learning disabilities program, were there any other support personnel?

A. Yes. In each learning disabilities classroom, there are two educational aides.

Q. And with regard to your aide, how long had your aide been with you?

A. I believe my aide had been with me at least three years at that time, but I can't recall for sure.

Q. What is the purpose of a teacher's aide?

A. Well, in a classroom with children with learning disabilities, there are times, many times during the day when -- in a class period when support is needed, when I may be working with a group of students and there are other students who need help with their particular assignments, and the aide can offer that assistance.

Q. Now, for the 1983-84 school year, would Alex be mainstreamed in any subjects?

A. No, none of the core subjects. Again, he would go out for his electives.

Q. And what electives would they be?

A. For a student there could be physical education, art, music, home economics, shop.

P. 23, l. 9 to P. 23, l. 22

Q. In the IEP that was prepared in March of 1984, is there a section for creative development?

A. Yes, there is.

Q. And how did you propose to address Alex's creativity?

A. Well, in the two areas, one would be problem solving, you could use current events in that area to develop ideas on nuclear energy and other particular problems of the day. And the other one was brainstorming techniques. You know, here's a problem, you know, how can we solve it. Let's come up with some ideas.

Q. And why was this area of creative development included in the IEP?

A. I believe that Alex's score on an IQ test indicated he had the abilities for an area like this on the IEP.

P. 31, l. 2 to p. 37, l. 9

THE COURT: May I ask a question or two at this point?

BY THE COURT:

Q. We're concerned with the IEP for '83 and'84. It's not clear to me the set-up of the resource classrooms. Did Alex remain in the same room all day, did he move to other rooms, and when he was in a particular room, were there other students from other grades in those rooms?

A. Okay. For the '82-83 school year, Alex started out in a self-contained classroom where he basically stayed in that room for all of his major subject areas and only left that room for art, music, physical education.

Q. What grade was he in during that year?

A. That was the seventh grade.

Q. Seventh grade. Were there other grades in that classroom?

A. When he's in these self-contained classroom, there are eighth graders or ninth graders. Generally there -- in the self-contained classroom, there could be as many as two different grade levels in there at one time.

Q. And a total of how many students would be in that class?

A. Again, it could be as many as ten, maybe eleven.

Q. Ten or eleven students. And what about teacher aides present?

A. Again, there would be one teacher aide for a particular classroom.

Q. All right. Now, the plan for '83-84, what did the IEP call for there in respect to whether he would remain in one resource classroom or whether he would ...

A. He would ...

Q. ... visit other resource classrooms, who would be in each of those rooms, where there other grades in each of those rooms, how many students roughly would be in each of those rooms and teachers aides? Could you -- would you help me on that?

A. Yeah. I'd like to go back. In the beginning of the '82 school year, '82-83 well, Alex was self-contained in that he had only one teacher for those subject areas. In the '83-84 he would have had myself and the other special education teacher for the major subject areas. We would have divided up. I believe for that year he would have had me for reading and math, and he would have had the other teacher for science, social studies and English. Also ...

Q. Now, you're talking about the IEP for '83-84?

A. Yes.

Q. He would have had two teachers?

A. Yes. He would have had another teacher -- he would have also had other teachers for physical education, home economics, art. Then getting back to the number of students depending on the subject area, it could range, you know, between five to eleven students. There would be other grade levels in there with Alex at times. To give you an example, I sometimes have a seventh grade science class in the room at the same time that I may be having a ninth grade social studies class. So there are times where there are other grade levels in there.

Q. Would there be two teachers

teaching in the same room simultaneously under those circumstances?

A. There would be myself and an aide, and there are divisors that we put up to not make it distractable for the two groups.

Q. Room separators so to speak?

A. Yes.

Q. Now, for the '83-84 IEP, would he stay in the same resource classroom or would he go to other resource classrooms for other subjects?

A. He would have gone between my resource classroom and the other resource classroom, the other special education teacher. So there would have been two rooms that he would have taken his major subjects in.

THE COURT: All right; thank you. Shall we have cross-examination.

MR. BOGIN: Yes, Your Honor. Is it all right if I use the lectern?

THE COURT: Yes.

MR. BOGIN: I'm used to cross-examining standing up.

CROSS-EXAMINATION

BY MR. BOGIN:

Q. Now, Mr. Talerico, you said that in your opinion Alex was dyslexic?

A. I believe that was the diagnosis that was given to us.

Q. And you defined that term as meaning problems with the use of language; right?

A. And reading, yes.

Q. Well, acquiring and using language; right?

A. Yes.

Q. And isn't it also correct that Alex had receptive expressive language problems?

A. I believe that's so.

Q. And would you tell the Court what expressive and receptive -- well, let's do it one at a time. What's expressive language?

A. The ability to put his thoughts into words.

Q. And that -- and one can be expressive either orally or on paper?

A. On paper, yes.

Q. And tell the Court what receptive language is.

A. The ability to read and understand information, take in.

Q. Well, it's not only reading information. It's hearing information; isn't that right?

A. Yes.

Q. So it's the ability to understand spoken language; right?

A. Yes.

Q. And Alex had disabilities in both the expressive and the receptive channels; right?

A. I believe he did.

Q. Well, do you know?

A. I don't recall at this time, but ...

Q. You taught him; isn't that right?

A. Yes, I did.

Q. But you don't recall whether he had both expressive and receptive problems?

A. No, not at this time I don't.

Q. Now, I believe in your testimony you were telling the Court that you would have grouped Alex -- that there would have been six children in your resource room program who were on the same level as Alex; remember that testimony?

A. Yes.

Q. And by using the term on the same language, [sic] are you talking cognitively or performance?

A. The students who were in there, in that particular class period, some of them demonstrated the same difficulties that Alex was having as far as word attack skills, comprehension.

Q. Uh-huh. So there were having -- they were achieving on the same level; isn't that right?

A. Yes.

Q. Now, you're aware of Alex's cognitive skills?

A. Could you be more specific?

Q. Well, do you remember ever seeing some scores on a Wexler intelligence scale for children devised?

A. Yes.

Q. And do you remember what those scores were?

A. Offhand I don't.

Q. Do you remember that Alex had a 40 point discrepancy between his verbal ...

A. Oh, yes, I do recall that.

Q. Excuse me. We need to do it one at a time because we're recording.

A. Okay.

Q. Do you remember that Alex had a 40 point discrepancy between his verbal and performance scores on the Wexler?

A. Yes.

Q. And which was higher?

A. The performance.

Q. And his performance score was about 140; isn't that right?

A. I believe it was somewhere in that range.

Q. Which is about the 99.7 percentile; right?

A. Yes.

Q. And is it your testimony that these other six children had 40 point discrepancies between their verbal and achievement scores?

A. No, perhaps I was -- I didn't answer that other question appropriately.

Q. So they didn't have 40 point discrepancies; right?

A. No other student in there that I am aware of had a 40 point discrepancy.

Q. And there was no other student who had a 140 on one of the subtests either; isn't that right?

A. Not that I'm aware of.

P. 40., l. 10 to p. 41, l.20

Q. Now, I believe that on direct you told Miss Sommer - well, strike that. Miss Sommer asked you what the proposal was for the '83-84 school year, and you gave her an answer about Alex being in the resource room and then getting mainstreaming for phys. ed., health, and -- remember that testimony?

A. Yes.

Q. Now, where was -- if you know, where was that proposal contained in writing, in the document that was sent to Mr. Muth?

A. Are you talking about the IEP?

Q. Well, I'm just asking where the proposal that you described for us orally is encompassed in writing?

A. Well, on the cover page of the IEP it mentions that Alex's primary assignment would be in the learning disabilities program and Alex will participate in art, music, physical education, health, shop and/or home economics.

Q. Okay. And the present date for that document is either April 25th, 1984 or March 28th, 1984 depending; right?

A. That's right.

Q. So when -- Alex was to begin the '83-84 school year I take it in September of 1983?

A. Yes. He would have been in there September of 1983.

Q. And this document was not done until the spring of 1984?

A. That's true.

Q. So was there anything in writing in September of 1983 to your knowledge that described to Mr. Muth the program that would be given to Alex?

A. Well, we had met the multi-disciplinary team meeting in June and the meeting was to reconvened in September to discuss that, and the meeting was never held.

Q. So the answer is no, there was nothing in writing?

A. Not that I'm aware of, although Mr. Muth may have had something in writing from the school district.

Q. And this IEP was not developed until the spring of '83 -- I'm sorry -- '84; right:

A. That's true.

P. 46, lines 6 - 15

ROBERT LAWS, DEFENDANT'S WITNESS SWORN

THE CLERK: Speak loud into the microphone. State and spell your name for the record.

DR. LAWS: My name is Robert Laws, L-A-W-S

DIRECT EXAMINATION

BY MISS SOMMER

Q. Dr. Laws, by whom are you employed?

A. Central Bucks School District.

Q. In what capacity?

A. I'm Director of Pupil Services.

P. 46, l. 25 to p. 47, l. 2

Q. Dr. Laws, were you involved in the due process proceeding with Alexander Muth -- involving Alexander Muth?

A. Yes, I was.

P. 47, l. 17 to p. 48, l. 12

Q. And what was your involvement?

A. There was a multi-disciplinary team meeting held sometime in late February or early March with Mr. Muth, wherein we discussed some difficulties Alexander was having in the resource room, and specifically a report from Elizabeth Fallon, who was the school psychologist at Lenape, and who was seeing Alexander that the time. Se commented that Alexander was expressing to her a good deal of frustration and disappointment that he wasn't able to be mainstreamed at all, and was commenting that he really needed something to make him feel normal. During that discussion with Mr. Muth and the team, we decided to try some mainstreaming with Alexander to see if that would help. At that point the decision was to mainstream him for English and science, I believe.

Q. At the end of the school year, was another team meeting held to discuss and evaluate the mainstreaming?

A. Yes. The team reconvened in June of 1983 to evaluate the success or lack of success in that mainstreaming experience. At that time it was recommended that beginning with the 1983-84 school year, we felt that a full-time program would be more appropriate and that we should discontinue the mainstreaming.

P. 56, lines 1 to 2

CROSS-EXAMINATION

BY MR. BOGIN:

P. 57, l. 14 to P. 59, l. 8

Q. Now, you're familiar with the notices of recommended assignment, I believe, do you recall?

A. Yes.

Q. NORA, everyone refers to. Would you tell the Court first of all -- well, what is a NORA?

A. Well, NORA is the notice of recommended assignment, wherein a school district must issue that to a parent, making a recommendation for placement and an outline of the proposed program.

Q. And those are forms, aren't they?

A. Correct.

Q. Who produced those forms, the

local district or the state education agency?

A. Who reproduces them or ...

Q. Well, who developed the forms, if you know?

A. I believed it was developed in the Commonwealth of Pennsylvania out of the Park decision back in 1972.

Q. So it's a state -- it's a form supplied to you by the state; right?

A. Yes. In our case, we happen to get our forms from the local intermediate unit.

Q. But it's reasonably developed by the state?

A. Yes.

Q. Before school began in September of 1983, was a NORA sent to Mr. Muth concerning Alex's placement for the '83-84 school year?

A. No, I don't believe it was

because at that time we had already in June requested a due process hearing?

Q. Who had requested a due process hearing?

A. Mr. Muth ...

Q. And ...

A. ... through a letter to me following our June 17th meeting. He had sent a letter requesting a due process hearing.

Q. Uh-huh.

A. I then made those arrangements by phone through the Pennsylvania Department of Education.

Q. Uh-huh. And it's your position that once a due process hearing was requested, you had no more responsibilities in terms of providing Alex's program?

A. My position on that is, our district continues to have responsibility to provide a program for Alexander. In the case of -- in this particular case, this youngster was removed from the school district, and it was then under the jurisdiction of the hearing officer as to how we would proceed from there.

P. 61, l. 21 to p. 64, l. 2

A. The purpose of that due process hearing was to, to use your words, convince that hearing officer that our program in Central Bucks was appropriate, considering the recommendation made for no further mainstreaming. You have to remember that that mainstreaming was done on a diagnostic basis to respond to the emotional state that Alexander was in at the time.

Q. There was no disagreement, was there, that the mainstreaming didn't work? That wasn't a dispute, was it?

A. That's correct, it was not a dispute.

Q. Mr. Muth didn't want more mainstreaming for Alex; right?

A. At that time. In March ...

Q. Yeah.

A. In March, he along with the team, wanted more mainstreaming.

Q. I understand. And that ...

A. In June we decided it was no longer appropriate.

Q. Yeah. It was an experiment from March to June ...

A. That's right.

Q. ... and all agreed that it failed?

A. That's right.

Q. And so that you went to that hearing in September to prove that the program at Lenape was appropriate to meet Alex's needs; right?

A. Correct.

Q. And the program that you attempted to prove to meet Alex's needs was the IEP that had been developed in March of '83; isn't't that right?

MS. SOMMER: Object; it's been asked and answered.

THE COURT: Overruled.

A. Well, that was one of the documents entered.

Q. That was the only IEP entered for '83-84; isn't that right?

A. Yes, it was.

Q. Now, is it your position that you needed Mr. Muth's permission to develop another IEP for '83-84 if you felt that the one that had been developed in March was inappropriate to meet his needs?

A. Well, we viewed the parent as an integral part of that IEP planning meeting, and I believe federal law requires the parent to be present.

Q. So it's your testimony that in order to prepare a valid IEP for any school year, the school district needs the parent present; is that right?

A. Whenever possible we'd like to have the parent there, yes.

Q. Well, that's not the -- that's different than the answer you just gave me, isn't it? My question is, does the parent -- is it mandated that the parent be there?

A. If the parent does not show up for an IEP conference, the school district will go ahead and prepare a draft IEP and request parental review and input. There are certain situations where we know parents cannot physically come to a conference.

Q. Uh-huh. And you're mandated to take certain provisions to ensure that they're either present or that the conference is brought to them; right?

A. It is our responsibility to provide and prepare an appropriate program for our exceptional children, yes.

P. 64, line 25 to P. 65, 1.23

REDIRECT EXAMINATION

BY MS. SOMMER:

Q. Doctor Laws, at the due process hearing or September 30th, 1983, was there testimony regarding the inappropriateness of the March 1983 IEP?

A. Yes, there was.

Q. And was there testimony regarding what the District believed was an appropriate program for Alex for the '83-84 school year?

A. Yes, there was.

Q. And did you testify at that hearing about what was appropriate for Alex for the '83-84 school year?

A. Yes, I did.

Q. What did you testify to regarding the appropriate program to be presented by the Central Bucks School District for the '83-84 school year?

A. For the 1983-84 school year, we recommended that Alexander have all of his core academic subjects under the direction of a learning disability teacher. We have two learning disability teachers at Lenape Junior High and his time was to be divided between those two learning disability teachers. Consistent with the least restrictive environment, Alexander would be mainstreamed for special subjects, art, music, phys. ed., home arts and practical arts.

P. 73., l. 2 to p. 75, l. 3

BY MS. SOMMER:

Q. Mr. Taylor, did you review the records of the Landmark School from September 1983 through June of 1985?

A. Yes. I did.

Q. And did you review the two IEPs from Landmark School for '83 through '85?

A. Yes, I did.

Q. Did you review the records from the Wyncote Academy from 1985 through June of 1986?

A. Yes, that is correct.

Q. Did you also review the report of Doctor Atkins, dated May of '85?

A. Yes, I did.

Q. Did you prepare an IEP for Alexander Muth for the 1986-87 school year?

A. Yes. I prepared a draft IEP in consultation with the diagnostic learning consultant that we have in the school district, who reviewed the information, especially the test information, with me, Mrs. Judy Tolson. She put together the present educational level statement, and then from there I drew up the specific goals and objectives that you see in the IEP in front of you.

Q. Do you have a copy of the Central Bucks 9, the IEP for the 1986 school year in front of you?

A. Yes, I do.

Q. Mr. Taylor, what is the first document contained in the proposal for 1986-87?

A. The first page is the notice of recommended assignment indicating that the Central Bucks School District recommends that Robert Muth, presently in Wyncote Academy, be placed in grade eleven, learning disabilities resource room, operated by Central Bucks East High School.

Q. And on the second page, what document is that?

A. The second page is the multi-disciplinary team report. What this is is once I had the opportunity to review the previous test materials and reports from Wyncote and Landmark, I then shared that information along with the IEP that's coming with the multi-disciplinary team at CB East High

School I wanted to be sure that we had a program that would be appropriate to meet Robert's needs at Central Bucks East High School. The participants of that meeting are identified at the bottom of the page; Jerry Stemplewicz, who is one of the learning disabilities teachers there, Kathy Regan, who is a certified school psychologist, James Gallagher, who is the building principal, myself, Judy Tolson, who is the diagnostic learning consultant I mentioned earlier, and also Doctor Robert Laws.

Q. And what was the recommendation of the multi-disciplinary team?

A. It was the concensus of the group based upon information that we had in front of us that the Central Bucks School District could offer an appropriate program for Robert at Central Bucks East High School.

P. 80, l. 5. to p. 82, l. 17

Q. Can you describe the types of learning disabilities that are seen in the eleventh grade population at Central Bucks East?

A. The majority of the students who are learning disabled have their disability in the area of auditory skills, difficulty in retaining information that is presented to them auditorily.

Q. From your review of the records, is it your opinion that Alex has a similar problem?

A. Yes.

Q. Mr. Taylor, do you know what

the average IQ -- full scale IQ of the students in the regular education for the Central Bucks School District is?

MR. BOGIN: Objection. What's the relevance?

THE COURT: Is this relevant?

MS. SOMMER: Yes, Your Honor, only to show where Alex fits in terms of his IQ.

THE COURT: Overruled.

A. The average IQ of the student in the Central Bucks School District is 115.

Q. And do you know what Alex's full scale IQ is?

A. Yes, I do.

Q. What is that?

A. The performance IQ is 139, and the verbal IQ is 98, full scale of 120.

Q. Are there other learning disabled students in the program at

Central Bucks East High School with a discrepancy between their verbal and performance IQs?

A. Yes, there is.

Q. And are there any with similar discrepancies to Alex?

A. Yes. There are at least four or five students with similar discrepancies.

Q. When you're talking about a similar discrepancy, what kind of a discrepancy are you referring to.

A. I'm talking about at least a 20 point discrepancy between the verbal and performance IQ.

Q. Is it fair to say there are not students with a 40 point discrepancy?

A. None at Central Bucks East High School at this time in the eleventh grade.

Q. Now, I notice in the IEP form itself that the third page of that IEP is a document entitled, Placement Options. When you prepared the IEP, what other placement options, other than the program you've proposed, did you consider?

THE COURT: What exhibit is this?

MS. SOMMER: Your Honor, that's the proposal for '86-87, Central Bucks 9.

THE COURT: Thank you.

MS. SOMMER: Page three.

A. The process procedure that we use any time that a youngster moves into the Central Bucks School District and has been identified as a learning disabled youngster, outside or even inside of the school district that is returning, as part of the review process, we attempt to determine if in fact we have a program that is appropriate. We take a look at all the options that we have, as we did in the case of Robert, and one of his options would be simply attendance in regular education. And we ruled that out as not being appropriate to meet all of his educational needs at this point in time. We also ruled out the option of private schooling. Once again, we didn't feel that private school would afford him the opportunities for mainstreaming and integration with regular education kids that attendance in a public school program would.

P. 93, 1.25 to p. 95, 1.16

Q. With regard to the word attack goal, where did you notice that Alex needed help developing decoding skills?

A. Throughout much of the education information that we have gathered on him, previous testing results, teacher comments on the records and so forth that we received from Landmark.

Q. Is it fair to say that while at the Central Bucks School District, Alex also had decoding problems?

A. Yes, that is true.

Q. And that decoding problem was evidenced in the Landmark records as well?

A. Yes, very much so.

Q. How did you propose to -- that Alex be taught to decode?

A. The system that we use in all of our programs, not just at the high school, is really pretty much dependent upon the student's needs as determined by the present educational levels. If a student learns better auditorily, then we present that material to that youngster in that mode. In other words, if the student can sit in the classroom and gather information, retain information auditorily, then that's how we will present it to him. If the student learns better through the visual mode, then we'll present materials and teaching activities in that area to best teach the student. So it's really a number of different things. For Robert in this case, once again we went back to the records and so forth we had from Central Bucks and also from the Landmark School, and saw that they had done some things with regard to phonetic skills, linguistic skills, some language kinds of things, tried to use a number of different materials, tried to use specifically a VAKT kind of approach with him, and it obviously was successful according to the pre- and post-test scores that we had on him, so we wanted to be able to duplicate that.

Q. The VAKT approach was the visual, auditory, kinesthetic and tactile approach that Mr. Talerico discussed earlier?

A. Yes, that is correct.

Q. Were many of these short term objectives adopted from the IEPs from the Landmark School?

A. Yes. They would simply be a continuation with the youngster. If he's working at a fifth grade level in reading, let's say, there are some skills that he has mastered and some that he has not mastered at this point in time, the IEPs indicated that and we would simply add to goals in a sequential kind of way.

P. 107, l. 24 to p. 108, l. 25

CROSS EXAMINATION

BY MR. BOGIN:

Q. Now, Mr. Taylor, just so I understand, CB-9, which is the NORA, the IEP and the results of the multi-disciplinary team report, is Central Bucks' proposal for the 1986-87 school year; is that right?

A. We have not met with the parent at this point in time, understanding that this is a draft. This is the draft that we would share with the parent pending the IEP conference.

Q. Well, let me ask you the question again. Is this Central Bucks' proposal for the 1986-87 school year or is it not?

A. It is a proposal.

Q. And if Alex were to attend -- strike that. If this Court were to order Alex to attend the Central Bucks School District for '86-87, CB-9 is what would contain his program; is that right?

A. With the parent input, yes.

Q. Now, you've had -- there has been no IEP meeting; isn't that right?

A. That is correct.

Q. There's been no notification to Mr. Muth of an IEP meeting isn't that right?

A. That is correct.

Q. This document has been developed without Mr. Muth's input; isn't that correct?

A. It is a draft.

Q. I beg your pardon?

A. It is a draft of the proposal as we have referred to it.

P. 113, l. 20 to p. 116, l. 10

Q. Now, you said that one of the -- used several foundations for the development of the IEP; isn't that right?

A. Yes, that's right.

Q. And one of them was IEPS that have been done by Landmark; right?

A. That is correct.

Q. And another one would have been the education records developed on Alex by Landmark; isn't that right?

A. That is right.

Q. So I take it that you consider what Landmark did to be appropriate with Alex?

A. Yes, we have no problem with it. In fact, we thought it was very appropriate.

Q. Uh-huh. And I take it you

consider what Landmark did with Alex to be successful?

A. Yes, it was successful as indicated by the test scores, pre and post.

Q. And based on what you know of Alex, as well as what you've seen in the records, I take it your opinion were that if he were to go back to Landmark, they would continue with the same program; right?

A. I would suspect they probably would

Q. And would it be ...

THE COURT: Well, that's seeking speculation from the witness. Go ahead.

Q. Now, you told Miss Sommer that the average verbal IQ in the learning disabilities classroom was in the 90s; is that right?

A. That is correct.

Q. How about the average performance IQ?

A. The average performance IQ would probably be in the low 100s to 110 range.

Q. And Alex is 139; isn't that right?

A. That is correct.

Q. Which is about a standard deviation and a half above average; right?

A. That's right.

Q. That's a highly significant difference; isn't it?

A. Yes, it is.

Q. And isn't it -- wouldn't you also agree that an accurate measure of Alex's intellectual potential is probably more closely to his performance IQ score than his his verbal IQ score?

A. Would you repeat that again please?

Q. I'll rephrase it for you. Would you agree that Alex's -- that measuring Alex's intellectual potential is difficult because of his learning disability?

A. Yes, it is.

Q. And that because he has a learning disability in the verbal areas, the core on his verbal portion of the Wexler is depressed from his actual ability?

A. That I couldn't say.

Q. And would you also agree that the performance measure on the Wexler more nearly approximates his intellectual capability than the verbal?

A. I couldn't say that either. I think I can say with regard to the disparity, I do recognize the fact that it is significant, but the intent of the Individual Educational Program would be to look at that verbal score and provide an IEP accordingly, concentrating on those specific strengths and weaknesses that he has with that 98 verbal IQ, likewise taking a look at the verbal IQ -- or excuse me, the performance IQ of 139 and providing a program then that meets the needs of that particular score.

Q. Uh-huh. Within the constraints of what's going on in the Central Bucks School District; right?

A. Yes.

P. 116, l. 24 to P. 117, l.7

Q. Now, it's my understanding that the proposal for vocational -- for Alex going to the Vocational-Technical School came from Doctor Atkins report; is that right?

A. Yes, that is correct.

Q. And if you'll bear with me for one second ...

A. And also I think there were some indicators of Landmark School, too, of some experiences there that he had -- that Robert had with some hands on kinds of things that he was interested in that, highly motivated and successful.

P. 128, l. 22 to P. 29, l. 5

BY MS. SOMMER:

Q. Do you recall in reviewing the Landmark records whether Alex had participated in a science project?

A. Yes, I believe he did.

Q. And do you recall whether he had been -- do you recall what that project was?

A. Not right this moment I don't, no. I seems to me that it was something that he was very interested in a and motivated about.

MS. SOMMER: I have no other questions.

P. 130, l. 25 to P. 131, l. 22

Robert Laws, Defendant's Witness Previously Sworn

DIRECT EXAMINATION

BY MS. SOMMER

Q. Did you form an opinion as to

whether or not the IEP proposed for the '86-87 school year was appropriate?

A. Yes, I did.

Q. And what is that opinion?

A. My opinion is that the program outlined in the 1986-87 proposed IEP for Alexander at Central Bucks East is appropriate.

Q. On what do you base that opinion?

A. That program was designed to maximize the strengths that we saw in Alexander's performance, to take into consideration what weaknesses he had, in an effort to construct a program that he would benefit from. It also enables him to have a program in a lesser restricting placement and one in which he would have contact with non-handicapped peers.

Q. Is it your opinion that this less restrictive placement is important for Alex?

A. Yes, it is.

Q. And on what do you base that opinion?

A. From my knowledge of Alexander through the records that I have reviewed, while he does have a significant learning disability, he also needs to have contact with regular education peers so that he can take advantage of opportunities in a regular high school program.

Q. Have you reviewed the testing results from Landmark Academy and Wyncote Academy?

A. Yes, I have.

P. 136, l. 26 to P. 137, l. 25

Q. Now, did you do any -- did you draw any conclusions from the test results that you reviewed from Alex's three years out of the school district?

A. Well, essentially my conclusions were that -- yes, I did draw some conclusions. Essentially they were that Alexander seemed to make progress at Landmark in very much a similar pattern that we noticed while he was in Central Bucks.

Q. When reviewing the Landmark records, did you notice in the reports from the different teachers whether Alex was having difficulties adjusting to the program?

A. The reports that I reviewed from Landmark indicated a fine adjustment during the 1983-84 school year, and for at least the first half of the 1984-85 school year. From about January of 1984, however, the reports start to indicate that Alexander was beginning to have some difficulty, particularly in the area of receiving constructive criticism around projects or assignments. It also indicated that assignments were not being turned in regularly. It made a reference to attendance, that he wasn't attending classes frequently. And many of the reports toward the end of the 1984-85 school year were indicating that -- from the teachers that they felt Alexander could be making better progress, but thinks he was not adjusting at that point.

Q. Was Alex withdrawn from the Central Bucks -- from the Landmark School in March of 1985?

A. Yes, I believe he was.

P. 139, l. 11 to P. 140, l.19

Q. Doctor Laws, do you have an opinion as to the importance of mainstreaming Alex in regular education classrooms?

A. Despite the fact that Alexander has a significant learning disability, I believe that it's vitally important for him to have contact with regular education peers. I believe it's important for him to be in a home environment, to live in a neighborhood, and to go to school with kids in the neighborhood so that he can take part in extra-curricular activities. It's my opinion that no matter how learning disabled a youngster is that youngster can still take part in activities and non-academic courses with non-handicapped peers.

Q. When Alex was in the Central Bucks School District, was it determined that he had some emotional problems?

A. We felt that there was some emotional interference in Alexander's learning.

Q. And what -- was there any conclusions drawn as to part of the reasons for this emotional interference?

A. I think the conclusions or the origin of some of those emotional difficulties is still a mystery to many of us. However, we felt that reports from Alexander were indicating that he very much wanted to be associated with what he referred to as a normal kids, which is one of the reasons we tried the mainstreaming experience. We also felt that and had recommended that Alexander and his father become involved in counseling.

Q. What was the reason for the recommendation?

A. Well, we felt that the relationship between Alexander and his father needed some help in developing a better system of communication.

Q. Where is the Landmark School located?

A. Landmark School is located in Prides Crossing, Massachusetts.

Q. And Alexander would be living in a school environment as opposed to a home environment?

A. He would be living in a dormitory, yes.

P. 144, l. 17 to P. 146, l. 7

CROSS EXAMINATION

BY MR. BOGIN:

Q. Now, you said you had concerns about Alex's emotional state if he went to Landmark; is that right?

A. If he was in residence, yes.

Q. Well, he can't hardly go to Landmark if he doesn't reside there; can he?

MS. SOMMER: I object.

THE COURT: Sustained. That's not a helpful comment. Shall we continue? Ask questions.

Q. Is it true that you have concerns about Alex's emotional state if he were to go to Landmark?

A. Yes.

Q. And you are aware that Doctor Adamson has been seeing him for -- since 1983; isn't that right?

A. Yes.

Q. And you are also aware that Doctor Adamson is recommending that Alex go to Landmark; isn't'that right?

A. Yes.

Q. And Doctor Adamson is a psychiatrist who's been working with Alex; isn't that right?

A. Yes.

Q. Did you ever attempt to discuss your concerns about Alex's emotional state with Doctor Adamson?

A. No, I did not.

Q. Now, I believe you also said that in your opinion it's never appropriate to put a child in a full time special education -- a learning disabled child in a full time special education program; is that right?

A. I'm not sure I used the word never, but certainly generally speaking it is my philosophy that youngsters should be mainstreamed whenever possible, wherever possible.

Q. Well, when you mean possible, do you mean in terms of logistics or in terms of appropriateness.

A. In terms of appropriateness.

Q. And you also understand that Alex is going to be mainstreamed approximately half the time if he were to go to Central Bucks; is that right?

A. Well, out of the nine periods a day, I believe the IEP shows five academic subjects where he would be in the learning disability classroom. One of those nine periods is lunch, so he would have an opportunity to be mainstreamed for about three periods a day.

P. 148, l. 2 to P. 155, l. 7

WILLIAM C. ADAMSON, PLAINTIFF'S WITNESS, SWORN

THE CLERK: Speak loud into the microphone. State and spell your name for the record.

DR. ADAMSON: I'm William C. Adamson, M.D.

THE COURT: How do you spell your last name?

DR. ADAMSON: A-D-A-M-S-O-N

DIRECT EXAMINATION

BY MR. BOGIN:

Q. Would you give us briefly your educational and professional background?

A. I'm a graduate of Swarthmore College, University of Pennsylvania Medical School. I specialized in psychiatry and neurology through training at the Delaware State School Hospital for one year and one year at the Institute of Pennsylvania Hospital, two years of special training at the Philadelphia Child Guidance Clinic under Doctor Frederick Allen, after which I became director of the Austin Community Guidance Center in Austin, Texas where I worked with the courts and with the school system as director of Community Guidance Center. Then the director of Professional Services at the Woods Schools for exceptional children in Langhorne, Pennsylvania, where I worked with the directors of Education Recreation. Then proceeded to the Pathway School in Jeffersonville, Pennsylvania, which is a school for boys and girls who have learning disabilities, both day and residential. Proceeded as a staff psychiatrist at the Pathway School. Became clinical director of services from 1968 to 1978, and then director of Medical Psychiatric Services at the Pathway School. I'm also clinical professor of child and adolescent psychiatry at Hahnemann University, and a charter member of the Multi-Disciplinary academy for Clinical Education. I've authored the book -- handbook for specific learning disabilities with my wife, Katherine K. Adamson, published by Gardner Press in 1979.

Q. And are you board certified?

A. I'm board certified in both adult psychiatry and neurology and in child psychiatry, a sub-specialty of psychiatry and neurology.

Q. Are you familiar with Alexander Muth?

A. Yes. I have been working with Alexander Muth ...

THE COURT: Just a moment. Is there any cross-examination of qualifications?

MS. SOMMER: No, sir.

THE COURT: All right.

A. I've been working with Alexander Muth and his father from the spring of 1983 to the present.

Q. And you had the opportunity to evaluate him in the spring of 1983; is that correct?

A. Yes, I did.

Q. Well, could you tell the Court what the results of your evaluation were?

A. Yes. The evaluation proceeded first of all by getting a very careful medical history, reviewing all of the records that were available at that time, particularly the neurological records, the records from Doctor Atkins, and records from the Bucks County public school system. I then evaluated Alex in my own office and at that time determined that there are several major problems which he did in fact show. These problems were centered first of all on his major difficulty in word recognition, in spelling, and in a sample of handwriting which is referred to in my report, psychiatric evaluation of April and May 1983. The handwriting and the word expression, the written expression at that time was of such a low level it appeared to be really that of a youngster perhaps at the third grade level where he was still using manuscript rather than cursive writing.

He also had difficulties in the reading fluency area and comprehension was adequate. The other studies indicated that he had what we refer to as a very low self esteem, a hurt pride. And so in essense there were three things that came to be present. First of all, a neurologic impairment, or chronic brain syndrome as it's been called in the past; secondly, a major severe language learning disability, manifested by dyslexia, by very grave problems in written expression and by difficulty in terms of oral expression. The third area of problem was what I referred to as the hurt pride, or the low self-esteem, and this was manifested in the drawings which he did and in the ways he viewed himself as a person, essentially as a person who is failing. It carried with it a lot of anger, a lot of fear of criticism, a lot of struggles really just to find himself as a person.

Q. And from the spring of 1983 to the present, have you continued to work with Alex?

A. Yes, I have. I've continued to see Alex over a period of time, usually at times of the vacations from Landmark, but also more recently when he's been a student of Wyncote Academy, and then as recently as this past week. About fifteen visits in all.

Q. Now, did you notice any changes when Alex was at Landmark?

A. Yes. There is a very frightening and dramatic change that I noticed on October 20th, 1984, and with Your Honor's permission, I'd like to show this to you because you couldn't see it in the report, but this is right out of the file, his file, and I'd like to show you a written sample ...

THE COURT: Why don't you simply answer questions. If your lawyer wants me to see something, he will handle that.

MR. BOGIN: Well ...

THE COURT: Is this an exhibit? Is this a document that Miss Sommer has seen?

MR. BOGIN: Well, I'm going to take a look ...

THE COURT: All right.

BY MR. BOGIN:

Q. Well, describe for us while we're looking at this document ...

A. All right.

Q. ... the changes that you saw.

A. All right. Whereas in the 1984 sample of handwriting he used manuscript with spelling errors, with the inability really to make a complete sentence in answer to the question, why I'd like to be an astronaut, he was able in this paragraph to write cursively, to put sentences together with proper syntax, semantics, with very positive morphology of the words, and a beautiful expression of exactly the feelings that he was trying to get across that he had not been able to express in a written way prior to that Landmark experience.

Q. And did you consider that a significant change?

A. That's a very dramatic change.

Q. Why?

A. He essentially moved from a young man who was unable to express himself in a written form to a young man who was able to express himself cognitly, clearly, and practically up to age appropriate level.

Q. Now, did you notice any other changes when he was at Landmark?

A. There were changes that indicated that he had made some improvement in the reading areas. The specific one had to do with a greater fluency with word analysis and the capability of taking a word and breaking it down and being able to move ahead without pausing or without feeling failure or turning away to avoid the reading. The other thing that was apparent was that he seemed to be happy there. He felt that he was making progress, that he was with a peer group that understood him.

Q. Now, when you saw Alex for the first time in the spring of 1983, did you make any recommendations about the sort of schooling he ought to have?

A. Yes, I did.

Q. And please tell ...

A. I indicated in the last paragraph of the report ...

THE COURT: Is there a report ...

MR. BOGIN: Your Honor, that was ...

THE COURT: Is there a report this witness has rendered? Do I have a copy of it?

MR. BOGIN: Yes, Your Honor. That was admitted in the first due process hearing, the September 30 due process hearing, as exhibit P-2, and that is CB-1.

THE COURT: All right.

A. The recommendation reads, "In view of the degree of language functioning problems, it is strongly recommended that Alex attend the Landmark School in Prides Crossing, Massachusetts. The program is designed to help young people of promise to realize their full language and its potential, and therefore, especially intensive in programming on other mastering of skills of reading, writing, spelling and composition. All of these areas are areas in which Alex is extremely weak." The second recommendation was that Alex and father have ongoing counseling in order to improve the quality of communication, that this should be done prior to Alex's leaving for Landmark School and on the occasions of his returning for vacations.

Q. Now, when you made that recommendation after evaluating Alex, did you have any question about the affect of his going to Landmark on his emotional status?

A. I felt that he needed to have a positive learning experience. It was clear that he had had many years of failure and that he was continuing to feel that he was failing in the school experience. In order to raise his self-esteem, in order to give him a feeling of pride and accomplishment, it was important for him to have a successful learning experience, and I felt that he'd have a better opportunity at the Landmark program than any other program of which I was familiar.

Q. Did you think that it might engender any feelings of rejection on his part?

A. I felt that Alex was really asking for an opportunity to prove himself both to his father as well as to himself, and I felt that the important thing was a schooling program that would allow him to do that, and therefore that the residential aspect of it would not interfere, but would rather give him the opportunity if it was the kind of program we were looking for, would give him the opportunity to find himself as a person.

P. 171, l. 1 to P. 172, l. 19

A. I feel that this effort is premature, and I feel that it is picked up Doctor Atkins' impressions that a vocational program should be instituted at this time, and I feel that for that reason this IEP represents a watered down program for Alex Muth. It's too soon in his particular development to bring in this kind of vocational piece and to minimize the need for continuing emphasis on the specific language learning disability. There is not, in my opinion, adequate team supervisory coverage. Alex is a young man who does require a total team effort, and I don't see in this particular report any indication that there's going to be supervisory team coverage. It does not seem to me that it covers really a program specific enough. It's vague, and particularly the section where it talks about individual tutoring on that "as needed" basis, I think is very clear that it doesn't come in and hit hard on the areas where we know Alex Muth needs specific help. I just feel that the other thing that's missing, and I feel this very strongly, the thing that's missing in this IEP is the importance of creating a learning climate, a climate that allows for motivation, for desire, for success, and there's nothing in this IEP really that speaks to the importance of creating a positive learning climate for Alex Muth. It seems to me that this IEP could have been written for any student anywhere, a language disabled student or teenager, and it's just not a specific IEP for a young man with a severe language learning disability that still persists. There's still residuals of that language learning disability.

Q. Now, Doctor, are you familiar with the program that Alex received at the Landmark School?

A. Yes, I am.

Q. And are you able to give us an opinion as to whether or not it would be appropriate for Alex to return there for the '86-87 school year?

A. I feel it would be very appropriate for him to return to that program.

Q. And why is that?

A. Well, I think first of all, the

language problems are still there. The residuals are still there. He's only 16, and from our knowledge of brain development, his brain will continue to grow and mature until he hits the age of 19 or 20. So he still has at least three more years in which to master his learning and to achieve in the language level. Secondly, he's indicated that he does have the desire to return, in his words, to get back on the track and to try to make a go of it.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

RUSSELL A. MUTH, JR. : CIVIL ACTION
individually and on
behalf of his minor child,
ROBERT ALEXANDER MUTH :

v.

CENTRAL BUCKS SCHOOL
DISTRICT
and
DR. THOMAS L. NEWMAN
Superintendent of the
Central Bucks School
District : No. 84-2032

TRIAL TRANSCRIPT OF AUGUST 12, 1988

P. 3, l. 4 to p. 5, l. 17

THE COURT: Shall we continue?

MR. BOGIN: Yes, Your Honor. Doctor Adamson was on the stand.

(Pause)

THE COURT: Mr. Bogin?

DIRECT EXAMINATION

BY MR. BOGIN:

Q. Doctor, one of the problem areas that you told us about yesterday was Alex's low self-esteem; do you remember that?

A. Yes.

Q. Can you give us an opinion as to the affect on Alex's self-esteem of the proposal by the Central Bucks School District.

A. In my opinion, Alex's self-esteem would be lowered by the program that's been outlined by Lower Bucks on these four counts. First of all, it would not offer him the opportunity for success, and he's had repeated failures which leads to low self-esteem. He would not be offered the opportunity for a one-to-one tutorial which we've stressed is important. He wouldn't be offered the opportunity for an appropriate peer group. Alex happens to be a highly intelligent boy with a major severe language disability, and he expressed to me that one of the reasons why he had difficulty in Bucks County in his earlier '83 program was because "those guys aren't going anywhere, they don't feel like they want to go anywhere, and I want to go someplace in my life." So I feel that the peer group is very important. Thirdly, that particular IEP does not provide for an intensive; well-structured study hall program to reinforce the skills that have been learned in the classroom. And so he doesn't have the opportunity to really prove to himself that he can do it, that he can be successful. And in my testimony yesterday I indicated that this was one of his very, very real fears that he would fail in front of the group. And finally, I do not feel that the Bucks County '86-76 IEP provides a total learning climate appropriate to a young man with this severe dyslexia, with the severe language learning disability which he currently has.

Q. Now, Doctor, are you able to give us an opinion as to the affect on Alex's self-esteem of a return to Landmark?

A. It is my clinical opinion that the program at Landmark School would be a major step toward the enhancement of his self-esteem for the following reasons. First of all, it does provide a one-to-one intensive tutorial, the kind we described he needs. Secondly, it provides a peer group of adolescents his own age, and I understand from materials that I've read from Landmark that as many as fifteen percent, 15, fifteen percent of the teenagers there do have the severe language disability of the kind that Alex is currently struggling with. Thirdly, it does provide an organized intensive structured study hall experience every day in which the proctors are also the teachers from the classroom, and so there's a sense of continuity from classroom to study hall which allows him, if he makes a mistake, it allows him to have immediate correction on the spot, that allows him to feel good that he's mastered that, that allows him then not to experience the failure, that allows him then to raise his self-esteem and come back in a classroom the next day ready to learn.

And so the bottom line from me is that the Landmark School as I've come to know it, through the reports that I've received, through Alex's sharing with me and the material that's come in from the Landmark IEP does provide -- does provide a total learning climate for a teenage with a severe language learning disability.

P. 8, 1.21, to P. 9, 1. 5

CROSS EXAMINATION

BY MS. SOMMER:

Q. When you first began seeing Alex, Mr. Muth told you that he wanted your input about Alex's program of education; isn't that correct?

A. I'm just looking to see specifically what the -- what I list as the chief complaints and the chief concerns, and he had -- this is his chief concern. He was concerned about his son's lack of learning, his son's lack of mastery of reading, and the fact that he seemed to be very upset in his school placement.

TRIAL EXHIBITS

SCHOOL DISTRICT
Exhibit 7

INDIVIDUALIZED EDUCATION PROGRAM PLAN

Student's Name: Alexander Muth

Birth Date: 3/11/1970

Present Date: 9/30/80

Grade/Program: LD-RR Mainstream: Combination 4-5

Teacher(s): P. Krauss

District/School: Central Bucks / Kutz Elementary School

Primary Assignment(s):	Date Started	Expected Duration of Services	Special Media or Materials
LD Resource Room	9-30-80	9-29-81	
Speech	9-31-81	9-29-81	

Extent to which the child will participate in regular education: Mainstreamed for: Art - Physical Ed (lunch + recess) 5th grade
Music - Library - 4th grade

Services:

IEP Planning Meeting Participants:

Name

Local Education Agency Representative: Charles ... Neill Sup. of Sp. Ed.
Parent, Guardian or Surrogate Parent: Patricia L. Krauss (teacher)
Teachers(s): (parent)
F.H. Muth (principal)
A.P. Feeney
Russell ... Muth, Jr. Perez

Date for review and/or revision of the Individualized Education Program Plan: February 1981

Person responsible for the supervision of the IEP: Mr. Chuck Neill

274a

SCHOOL DISTRICT
Exhibit 12

PSYCHOLOGICAL CONSULTATION

NAME: R. Alexander Muth

Birthdate: 3-11-70

School & Grade: Kutz LD (5)

Date of Consultation: 3-13-81

Reason for Referral: Alexander arrived in the Central Bucks District in September, 1980. His previous school attendance had been in Texas and Columbia, S.A. where he had lived with his mother. Parents are divorced and Alex did not see his father during this approximate 3 1/2 year period. His primary language while living in S.A. was Spanish, although he has readapted well to the use of English and now speaks without an accent.

Alex was evaluated by a psychologist at the Abington Friends School in June, 1980 preparatory to possible enrollment there. He was given a more intensive evaluation in August, 1980 by Dr. Thomas Atkins, psychologist. Reports of both these examinations are in his files and should be consulted for particulars. Generally speaking, however, a significant difference was observed between Verbal and Performance IQ's on the WISC-R, accompanied by deflated academic accomplishment for his age and grade. A language disorder was diagnosed and an educational placement which "will provide an extensive remedial speech and language experience" was recommended.

Alex was enrolled in the Kutz Learning Disabilities Resource Program in September, 1980. He has been mainstreamed with the fourth grade for music and library and with the fifth grade for lunch, art and gym. Teachers indicate that he has been making appropriate academic progress and social adjustment.

Mr. Muth has expressed repeated concern to Alex's LD teacher and the school principal about Alex's alleged problems in adjusting to the LD class. Ostensibly he has felt embarrassed by his teacher in front of others and generally uncomfortable with interactions within that room. Mr. Muth felt that a personality conflict may exist between Alex and his teacher which is precluding a positive school experience for the boy.

Tests Administered:

Wide Range Achievement Test

House-Tree-Person Test

Sentence Completion Test

Rorschach

Interview

Behavioral Observations and Test Results: Alex was a quiet, soft-spoken, attractive young man who was spontaneous and open in discussing his life experiences and concerns. A predominant theme during discussion and projective techniques involved his discomfort with being in a Special Education class, inquiry regarding how long he would have to remain in this environment and confusion about why he was there in the first place. Many of these questions were resolved in his mind by focusing on his LD teacher, thereby associating her personally with the cause and promulgation of what he perceives to be a denegrating and embarrassing educational milieu. He did not present any concrete situations in which his teacher treated him unfairly or otherwise embarrassed and humiliated him. His comments about his interactions with her were essentially positive in this area. However, he did say that two other boys would be going back to the regular classroom next year and he couldn't join them "because the teacher won't let me," as well as similar statements which suggest that he blames the teacher for his educational placement.

Alex claims that he has lost potential friends because of his placement, as the other children tend to call him "retarded." An undercurrent of loneliness and insecurity permeated Alex's responses and conversation. Considerable confusion seemed to be extant regarding the stability of his current living environment, whether his father will "send him away" as he sees his mother as having done and whether he will eventually be "adopted" because his parents can't afford to keep him. These concerns seem to be intimately interwoven with a negative sense of self regard and its cutward manifestation of being placed in a Special Education Program. He sees himself as a flawed child whose faults are the basis of major difficulties in his life and their remediation his prime concern at the present time.

Results of the Wide Range Achievement Test can be compared to the scores from this test obtained in August, 1980:

		Grade	Standard Score
8/80	Reading	2.0	62
	Spelling	1.9	62
	Arithmetic	3.5	86
3/81	Reading	3.2	79
	Spelling	2.4	62
	Arithmetic	4.1	82

Alex used a phonics approach to Spelling and Reading and his ability to associate sound and symbol was greatly improved over testing in August, 1980. He continued to reverse "b' and "d" and did not spontaneously correct this, although he did indicate that he thought they were wrong as written. He made the corrections only after specific encouragement to do so.

Alex also experienced considerable difficulty with auditory discrimination. He confused and substituted like-sounding words during test administration and interview.

Recommendations and Parent Conference: Insights reviewed in this report were discussed in conference with Mr. Muth. The following recommendations for Alex appear to be appropriate at this time:

1. Continuation in his present academic setting.

2. Instigation of periodic sessions with the school guidance counselor who can, in turn, discuss concerns and difficulties with Mr. Muth (and vice versa) as they may arise.

3. Clarification to Alex of questions which he may have regarding his educational experience, as well as realistic possibilities regarding future living arrangements. Efforts should be made to reassure Alex in the areas of continued support, acceptance and affection on the part of significant others, as well as his own value and high esteem.

4. Alex's progress should be monitored and, if problems continue, he should be referred for additional suggestions.

/S/ Elizabeth Fallon
Certified School Psychologist

SCHOOL DISTRICT
EXHIBIT 14

Psychological Report

Report on Alexander Muth

School Kutz

Parents' Name Mr. Russell Muth

Grade 6 LD

Address 66 Springs Drive

Birthdate 3-11-70

Telephone 348-3014 (Work) 622-2665

Date of Evaluation 2-25-82

Reason for Referral To determine appropriate academic placement for next year.

TEST USED	DATE	RESULTS

Bender Gestalt Test ________________

Visual Aural Digit Span Test _______

Wide Range Achievement Test ________

Sentence Completion Test
Rorschach ______________________________

WECHSLER INTELLIGENCE SCALE
FOR CHILDREN-REVISED

Verbal Tests	Scaled Score	Test Age
Information	8	
Similarities	13	
Arithmetic	12	
Vocabulary	8	
Comprehension	8	
(Digit Span)	10	
Verbal IQ:	98	

Performance Tests	Scaled Score	Test Age
Picture Completion	17	
Picture Arrangement	15	
Block Design	14	
Object Assembly	19	
Coding	13	
(Mazes)		
Performance IQ:	139	
Full Scale IQ:	120	

COMMENTS: Alex has been enrolled in the Learning Disabilities Program for his fifth and sixth grade school years. He arrived in Central Bucks from out of state in September, 1980. Reports of previous psychological evaluations are in his file and should be consulted for results as well as for background information.

Mainstreaming had been effected for two major subjects but recent problems necessitated a return to the LD Program on a full time basis. Teachers report that Alex has expressed reluctance to perform in class and that he has been experiencing difficulty in keeping pace with scholastic activities in regular education. Reevaluation was requested in order to plan an appropriate academic program for Alex at the junior high level.

TEST RESULTS; WISC-R - Results indicate that Alex is currently functioning within the Average to Very Superior range of intellectual development. Verbal ability lagged significantly behind that of Performance although no subtest scaled scores fell below the low average category.

...

CONCLUSIONS and RECOMMENDATIONS: Alex appears to be a young man whose current intellectual functioning ranges between average and very superior. A significant gap exists between Verbal and Performance ability as measured by the WISC-R, and Alex's language disability continues to impede his academic progress.

In addition, projective techniques reveal a young man with a diminished self esteem as well as some depressive qualities. The Sentence Completion indicated that Alex feels that he "doesn't have any friends," and wonders why "some people hate me." In addition, other children "are smarter than me," and he wishes he were "in total regular class." He went on to say that he thinks he is best "at nothing," and things would be better if "I had a whole new life."

Test results were discussed in a Child Study Team meeting and, subsequently, in conference with Mr. Muth. The possibility of including Alex in the LD Program at Lenape Junior High was reviewed. Also under consideration was placement in a private school for Learning Disabled youngsters such as the Valley Day School.

In addition, involvement in a professional counseling milieu in order to help Alex deal more effectively with apparent conflicts is strongly recommended.

Mr. Muth indicated that he would contact Mr. Lange, Director of Special Education, in order to further explore the two educational placements discussed and, subsequently, a decision regarding next year's program planning would be made.

Elizabeth Fallon
Certified School
Psychologist

EF:ff

SCHOOL DISTRICT
EXHIBIT 9

INDIVIDUALIZED EDUCATION PROGRAM PLAN

Student's Name: Alex Muth

Birth Date: 3-11-70

Present Date: 3-16-82

Grade/Program: Gr. 6 LD

Teacher(s): Marybeth Tilghman

District/School: Central Bucks / Kutz

Primary Assignment(s):	Date Started	Expected Duration of Services	Special Media or Materials
LD Resource Room			

Extent to which the child will participate in regular education: Alex attends physical education, art and music and library in regular education.

Services:			
Language			
Bus transportation			

IEP Planning Meeting Participants:

	Name
Local Education Agency Representative:	
Parent, Guardian or Surrogate Parent:	
Teachers(s):	M. Tilghman

Date for review and/or revision of the Individualized Education Program Plan: February, 1983

Person responsible for the supervision of the IEP: Charles Neill, Supervisor of Special Education

[redacted]

SCHOOL DISTRICT
EXHIBIT 10

EDUCATIONAL EVALUATION BY CENTRAL BUCKS SCHOOL DISTRICT, MARCH 2, 1983 -- examiner: Judith Tolson

BUCKS COUNTY INTERMEDIATE UNIT #22
EDUCATIONAL EVALUATION

NAME:	Alexander Muth
BIRTHDATE:	3/11/70
C.A.	12-11
SCHOOL	Lenape Jr. High
TEACHER	
GRADE	7/R.R
DISTRICT	Central Bucks
EXAMINER	Judith Tolson
DATE TESTED	3/2/83
REFERRED BY	Elizabeth Fallon

REASON FOR REFERRAL

Alex was referred for an evaluation to establish present educational levels and to aid in determining an appropriate academic program.

SUMMARY OF INFORMATION

Alex was administered a WISC-R by Mrs. Fallon, school psychologist, on 2/25/82. The results of this test reveal that Alex's abiliteis fall within the superior range of intellectual functioning. There was a large discrepancy between the verbal and performance sections of this test. Alex has been in a class for learning disabled children since soon after entering the Central Bucks School District.

OBSERVABLE BEHAVIOR

Alex was brought to the testing session by his guidance counselor, Mr. Wagner. He initially attended well to all tasks presented but as the testing session progressed, Alex became more withdrawn and finally put his head down on the table and refused to work. With a great deal of encouragement, Alex was able to complete most of the items presented. Although he did verbalize spontaneously on occasions, for the most part, Alex was extremely quiet. When engaged in conversation with the examiner, he spoke openly about school and his desire to be placed in the "team" for instruction in various subjects.

. . .

SUMMARY

Alex is a twelve year, eleven month old boy who scores within the superior range of intellectual functioning. However, there appears to be a severe discrepancy between his ability and his academic achievement. Alex needed a great deal of encouragement to complete the tasks presented and toward the end of the testing session gave up totally.

Academically, Alex is instructional at the 3^2 grade level in reading. He has specific difficulties with word analysis skills and a limited sight vocabulary. Arithmetic appears to be his greatest strength and he is functioning approximately at the 5^9

grade level. Spelling skills are extremely weak and will require a great deal of remediation.

In conclusion, because of Alex's behavior during the test experience, all test results may not be a true measure of his academic ability.

SUGGESTIONS

Reading

Alex needs to develop a larger sight vocabulary which could best be done through wide reading.

While Alex has not made appreciable academic gains in reading the results of the listening comprehension list indicates that he is capable of understanding the content of age and/or grade level written material. Based on his lack of progress the use of auditory techniques in conjunction with visual tactile material are recommended.

Supplementary Materials

-Lessons and Vowel Consolant Sounds Curriculum Assoc.

-Reading Skill Practice Kid)
-Word Analysis Cards) Curriculum
-Spelling Word Finder) Associates

JT/bcm
cc Richard Coe
Dr. Robert Laws
Charles Neill
Mr. Russell Muth
Elizabeth Fallon
Judith Tolson

SCHOOL DISTRICT
EXHIBITS 1, 2, 4

Student's Name: R. Alexander Muth
Birth Date: 3-11-70
Present Date: 3-11-83

Grade/Program: 7th Regular Education (Team) / Resource R
Teacher(s): Vincent Talerico
District/School: Central Bucks / Lenape

Primary Assignment(s):	Date Started	Expected Duration of Services	Special Media or Materials
7th grade team	3-14		
Resource Room	3-14		

Extent to which the child will participate in regular education: Alex will take English and Science with the 7th grade team and will attend the Resource Room For Reading and Math

Services:			
Speech	3-14		

IEP Planning Meeting Participants:

	Name
Local Education Agency Representative:	David Spencer
Parent, Guardian or Surrogate Parent:	Russell / Muth
Teachers(s):	Vincent J. Talerico
	Charles Neill

Date for review and/or revision of the Individualized Education Program Plan: 3-84

Person responsible for the supervision of the IEP: Charles Neill

206

293a

SD-1

(NOTICE OF RECOMMENDED ASSIGNMENT)

Mr. Russell Muth, Jr.
66 Springs Drive
Doylestown, PA 18901
Name, Address of Parent

3/11/83
(Date)

Dear Mr. Muth

The Central Bucks school district recommends that Alex Muth (name of student) presently in LD program (present educational assignment) ~~be placed~~/continued in LD program (recommended assignment) operated by Central Bucks (operating agency) in Lenape Jr. High (location)

As you are aware, an individualized education program has been developed; a copy is attached. (A student who is no longer in need of special education will not have an IEP).

Before this recommendation is implemented, you have the right to further discussion with school officials and the right to a hearing before a designee of the State Secretary of Education. Attached is an outline of your rights concerning the educational program.

If you approve the recommendation, please indicate this by signing below; then return a copy of this page. Keep a copy for your records.

If you do not approve, please indicate this by signing below and listing the reasons; then return a copy of this page.

Please respond within 5 days if this was given to you in person, or within 10 days if you received this by mail. If you do not respond within the stated time, it will indicate that you approve the recommendation, and the program will be implemented.

Thomas A. Huurman
(signature, School District Superintendent)

For further information contact: ______

Return this to: ______

✓ I approve this recommendation and do not wish to request a pre-hearing conference or a hearing.

— I do not approve this recommendation. I request a pre-hearing conference. My reasons for not approving are: ______

3-11-83
(Date)

Russell Muth, Jr.
(Signature of Parent/Parents)

Copy to: Sp. Ed. Office, Student's File, Sp. Ed. Teacher, Parent

Name R Alexander Muth

Instructional Area: Reading

Present Date 3-11-83

Annual Goal: To improve the level of Alex's reading skills

SHORT-TERM OBJECTIVE	INSTRUCTIONAL METHODS MEDIA/MATERIAL TITLE(S) (OPTIONAL)	EVALUATION OF INSTRUCTIONAL OBJECTIVES	
		TESTS, MATERIALS EVALUATION PROCEDURES TO BE USED	CRITERIA OF SUCCESSFUL PERFORMANCE
Alex will reproduce the vowel sounds as presented by a modified linguistic vowel circle Alex will letter decode simple to complex syllable words	Auditory Discrimination in Depth	teacher made tests	85% accuracy

Name R Alexander Mith

Present Date 3-11-83

Instructional Area: Reading

Annual Goal:

SHORT-TERM OBJECTIVE	INSTRUCTIONAL METHODS MEDIA/MATERIAL TITLE(S) (OPTIONAL)	EVALUATION OF INSTRUCTIONAL OBJECTIVES	
		TESTS, MATERIALS EVALUATION PROCEDURES TO BE USED	CRITERIA OF SUCCESSFUL PERFORMANCE
alex will divide 3 or more syllable words into their syllable parts.	teacher made materials	teacher made tests	85% accuracy
Given a list of words, alex will identify prefixes and/or suffixes present in the word			

Name R Alexander Muth

Present Date 3-11-83

Instructional Area: Reading

Annual Goal:

SHORT-TERM OBJECTIVE	INSTRUCTIONAL METHODS MEDIA/MATERIAL TITLE(S) (OPTIONAL)	EVALUATION OF INSTRUCTIONAL OBJECTIVES	
		TESTS, MATERIALS EVALUATION PROCEDURES TO BE USED	CRITERIA OF SUCCESSFUL PERFORMANCE
Given a short reading selection, Alex will verify Factual Information, recognize meanings in context, understand modifications, recognize Cause and effect, and make inferences.	Reading for Concepts New Practice Readers Readers Digest Skill Builders	Grading of Daily Assignments	85% accuracy

Name R Alexander Mth

Present Date 3 - 83

Instructional Area: Mathematics

Annual Goal: To Improve the level of Alex's Math Skills

SHORT-TERM OBJECTIVE	INSTRUCTIONAL METHODS MEDIA/MATERIAL TITLE(S) (OPTIONAL)	EVALUATION OF INSTRUCTIONAL OBJECTIVES	
		TESTS, MATERIALS EVALUATION PROCEDURES TO BE USED	CRITERIA OF SUCCESSFUL PERFORMANCE
alex will review for the purposes of reinforcement the four basic operations (+, -, x, ÷) involving whole numbers.	Growth IN Mathematics Spectrum Series	Unit or Chapter tests	85% accuracy
Given a decimal fraction, alex will correctly read such.	teacher made materials	teacher made tests	

Name R Alexander Math
Present Date 3-83

Instructional Area: Mathematics

Annual Goal:

SHORT-TERM OBJECTIVE	INSTRUCTIONAL METHODS MEDIA/MATERIAL TITLE(S) (OPTIONAL)	EVALUATION OF INSTRUCTIONAL OBJECTIVES	
		TESTS, MATERIALS EVALUATION PROCEDURES TO BE USED	CRITERIA OF SUCCESSFUL PERFORMANCE
Aluf will learn the four place values of decimal numbers. Tenths, Hundredths, Thousandths, Ten Thousandths. Given a decimal number, Aluf will match it to a fraction of the same and read said number.	Growth in mathematics Houghton Mifflin Individualized Mathematics Program	Unit or Chapter tests Grading of Individualized assignments	85% accuracy

M-3

Name ______________________

Present Date ______________________

Instructional Area: Mathematics

Annual Goal:

SHORT-TERM OBJECTIVE	INSTRUCTIONAL METHODS MEDIA/MATERIAL TITLE(S) (OPTIONAL)	EVALUATION OF INSTRUCTIONAL OBJECTIVES	
		TESTS, MATERIALS EVALUATION PROCEDURES TO BE USED	CRITERIA OF SUCCESSFUL PERFORMANCE
Given a decimal number Alex will write the words for the number and reverse the process. after instruction in the four basic operations (+, -, x, ÷) involving whole numbers & decimal numbers. Alex will compute such	S.R.A. Materials Learning System Cross Number Puzzles	Grading of Daily Assignments	85% accuracy

Instructional Area: Mathematics

Annual Goal:

Name

Present Date

SHORT-TERM OBJECTIVE	INSTRUCTIONAL METHODS MEDIA/MATERIAL TITLE(S) (OPTIONAL)	EVALUATION OF INSTRUCTIONAL OBJECTIVES	
		TESTS, MATERIALS EVALUATION PROCEDURES TO BE USED	CRITERIA OF SUCCESSFUL PERFORMANCE
after instruction, alex will correctly compute problems using +, -, x, ÷ on decimal numbers alex will match a divided figure partially shaded, 1) to a given fraction. 2) orally tell what portion of the figure is shaded	as previously indicated	as previously indicated	as previously indicated

SCHOOL DISTRICT
EXHIBIT 3

Alex Muth - Program Planning/IEP Conference of 3/11/83

The following persons were in attendance: B. Fallon, R. Wagner, J. Tolson, V. Talerico, R. Laws and Mr. Muth.

In response to Mr. Muth's concern that Alex was not receiving appropriate programming, a conference was held and the following adaptions made:

1. Alex was removed from the LD class for part of the day.

2. Contact with Miss Rozsa was removed entirely.

3. Alex was placed in two team classes, English and science.

4. Team teachers were briefed regarding background from Mrs. Fallon.

5. All LD support will come from Mr. Talerico.

6. Alex will receive reading, math and study/support in the LD class.

A specific schedule was developed in which classes were alternated between "rest" periods or easier classes. Mr. Talerico or his aide will support Alex in the English and science class.

This placement was made as a result of Alex's current depressed emotional state. This was emphasized to Mr. Muth that this kind of a placement was diagnostic at best and would be reviewed periodically. We reiterated to Mr. Muth the need for this child to feel some degree of normalacy [sic].

Monitoring of Alex's program will occur in the following ways.

1. Mrs. Fallon will continue to see Alex on a weekly basis to discuss his feelings.

2. Periodic educational reviews will occur at six-week intervals. These will be accomplished by the following persons: Judy Tolson, Chuch Neill, Vince Talerico. The entire team would reassemble in May to review Alex's program for the 1983-84 school year.

NRL:ff
3/17/83
cc: C. Neill
    J. Tolson
    B. Fallon
    D. Spencer
    R. Wagner
    V. Talerico

CENTRAL BUCKS
EXHIBIT 13

PSYCHIATRIC EVALUATION

NAME: Robert Alexander Muth

DATE OF EVALUATION: 4/30, 5/7, 5/14/1983

AGE: 13 yrs., 2 mos. (d.o.b. 3/11/70)

I. PURPOSE OF EVALUATION

Mr. Russel Muth, Alex Muth's father, expressed concern about his son who is in the seventh grade at Lenape Junior High School. He was aware that his son has been described as "performing in an inconsistent manner and that frequent absences contributed to the inconsistent performance." Few assignments had been turned as a result of the absences, and Alex had refused assistance from teachers and teacher aide. Also, the teachers recognized that he was able to contribute in class and described his strengths as being in the verbal areas.

The school also expressed concern to the father that Alex "might be using his learning disability as an excuse for not making an effort, even with considerable one-to-one support." It was felt that there might be emotional problems in Alex's life which were "exacerbating his learning difficulties, that there were emotional blockages with teachers such that he perceives some of them picking on him, and that he was not functioning well in this situation."

The school had also recommended that a psychiatric evaluation be done, and suggested the consulting psychiatrist to the Central Bucks School in Pennsylvania as a possible resource for this evaluation.

Mr. Muth elected to seek his own child psychiatrist and sought advice from this clinician.

II. BACKGROUND INFORMATION

Past Medical History. Mr. Muth stated that he was married in August, 1969. He recalled that his wife had a benign pregnancy, she was approximately 30 years of age. There was no known exposure to drugs or toxins. She was full-term at the time of delivery. He recalls that there was not "sufficient contractions and there was some consideration of Caesarian section for what appeared to be a placenta praevia. The mother was given Pitocin and delivery occurred with 24 hours after the rupture of the membranes. There was evidently a nuchal cord around the neck three times, and some question of a rapid delivery, though 24 hours would not be considered rapid. This was the first and only pregnancy of the mother.

The baby was born with no apparent congenital abnormalities or birth marks of any sort.

According to Mr. Muth, the first year was uneventful, and all milestones, including acquisition of language, were said to be on schedule.

Mr. Muth indicated that his wife was from Columbia, South America, that there had been considerable storm and stress in the marriage, and at one point he had sought out psychiatric counseling.

In 1976 his wife indicated dissatisfaction with the marriage, she became ill with a reported abdominal mass. She elected to go to her family in South America, left the home without telling Mr. Muth, and took her son with her.

In talking about the early years of child rearing, Mr. Muth said that his wife had a dual personality. She had good maternal instincts, and nursed Alex up until he was 3-1/2 years of age. On the other hand, she was very "hyper" in the discipline area. Was short-tempered, often paddled him with her shoe, and was very severe with him. He noted, "She always had plenty of money for nail polish but not money for her son when she was taking care of him in South America."

Apparently Alex lived with his mother who resided with her family from may, 1976 to December, 1979, when she returned to the United States and lived in the Houston area. Father then went to get Alex and brought him to Philadelphia in March 1980.

After the summer of 1980, Mr. Muth was to send Alex to visit his mother in Houston. When the mother called and there was some question as to whether she might be taking Alex to Bogata with her, Mr. Muth refused to send him to Houston as he did not want to risk having the child taken back to South America. He elected to keep him here, went through legal custody procedure. When his mother told Alex that his father had "fixed it so he couldn't see her until he was in his twenties" the young man became depressed, his school work took a nosedive, until the summer of 1982. It was during that summer of 1982 that Mr. Russel Bishop, of the Abington Friends School Summer Camp Program, advised that Alex should be allowed to see his mother. After two weeks of visiting with her he "was unhappy there and came home." Mr. Muth says his mother continues to call and keep in touch with him.

Past School History. Alex went to nursery school and kindergarten in the Philadelphia area, where no difficulties were noted. The parents then separated and his mother took him to Columbia, South America where he was placed in a Spanish-speaking school for the equivalent of first, second and third grade. Mr. Muth was not aware of any problem there.

In 1979 his mother returned to Houston, Texas, where Alex would have come into the middle of the fourth grade, but he was placed in the third grade because of his reading difficulties, for which he was given some remedial help.

In the summer of 1980, after securing legal custody of Alex, the young child, then 10 years of age, was placed in the summer program of the Abington Friends School, psychological testing was carried out at that time, which showed a marked discrepancy between his verbal and performance abilities with the additional conclusion that he had a learning disability, evidence of mixed cerebral dominance, and considerable left-right confusion.

In the summer of 1981, Alex was again placed in the Abington Friends School Summer Program, and it was noted that in comparison to the previous summer his peer relationships had improved markedly. His circle of friends expanded, and he was respected by the group.

Of great concern to the staff was what was reported as "evidence of a poor or insecure self-concept." He seemed to have unreasonably high expectations of himself, was his worst critic if he failed at something, and was apt to withdraw or to express anger (often at himself) in certain explosive ways. Nevertheless, there was considerable maturing noted in this regard, also, over his behavior patterns of the previous summer.

Alex indicates that things during the first year with his father seemed to be adequate, but following the summer of 1981 and going into 1982, "Things started going down the drain. Dad wouldn't listen. I would get in trouble trying to bargain with him to get what I wanted. We don't talk that much together now."

Past Psychological Testing. The initial testing in the United States was done through the Abington Friends School in June, 1980. It indicated a Wechsler Full-Scale I.Q. of 90, Verbal I.Q. of 72, and Performance Scale I.Q. of 114. The depressed Verbal Scale scores were thought largely, but not entirely, attributable to language differences. However, he had scored low on arithmetic, digit span, and coding subtests.

In July, 1980, he was seen by Dr. Thomas E. Akins, at the University of Pennsylvania. Dr. Akins identified the difficulty he had in identifying right and left sides of his body, his body parts, and in responding to simple requests. He noted the mixed dominance, and the problems Alex was having in speech and language usage including fragmented, poor grammar and syntax. At that time the Weschsler Intelligence Scale for Children-Revised showed Full-Scale I.Q. of 92, Verbal Scale I.Q. 75, Performance I.Q. 115. He noted that the subtests reflecting acquired information were far below what one would expect of a boy who was so observant and alert, even given the questionable fact of bilingualism. All subtests involving sequential thinking, attention, short-term memory were significantly poor. It was Dr. Akins impression that his problems "are not simply a matter of expressive verbal fluency or accuracy or verbal learning skills, as he performs within the normal range on specific measures in these areas. There seems no reason to suspect that primary emotional disorder, nor cultural shock, nor bilingual problems are a satisfactory explanation for his limited academic skills, nor for his general pattern of test performance." Dr. Akins suggested that a pediatric neurological evaluation was an important next step in an effort to clarify the problem.

Alex was seen by Dr. Samuel Tucker, pediatric neurologist, in the winter of 1980. At that time he noted that Alex was showing a severe language-based learning disability, for which historically there was no clear-cut explanation, though he leaned "toward the view that these were probably more likely to be genetically based than to be based on simple maturational lag or on the basis of an underlying brain dysfunction." An EEG carried out in conjunction with that evaluation was a normal waking record. The possibility of doing a CAT-Skan for ruling out a neurological condition was decided against, and Dr. Tucker's observation was that it did appear to be a significant learning problem, possibly on a genetically determined basis.

The next psycological study was done February 25, 1982 by the Central Bucks School District, Elizabeth Fallo, Certified school psychologist. In that study of the Wechsler Intelligence Scale for Children-Revised, Verbal IQ 98, Performance IQ 139, Full-Scale IQ 120. Psychologist noted he had been enrolled in a learning disabilities program for his fifth and sixth grades in school. Mainstreaming had been effected in two major subjects, but recent problems necessitated his return to the LD program on a full-time basis. On the Wide-Range Aptitude Tests at that time reading, 3.8, spelling 2.5, math 4.1. It was hoted that Alex continued to show significant lag in scholastic achievement, letter reversals, and diminished self-esteem with some depressive qualities. On this basis consideration of his placement in a private school for learning disabled children such as the Valley Day School was made. Professional counseling was also suggested to help him deal with the apparent conflicts with which he was struggling.

The most recent educational evaluation was completed on March 2, 1983 by Judith Tolson. In this evaluation he initially did well, however, as the testing session progressed, he became more withdrawn, and finally put his head down on the table and refused to work.

Results of the Standard Achievement Tests indicated reading 4.9, math 6.4, written language 3.9. In reading orally he could only read to the third level, had difficulty reading fourth grade, and could not comprehend the material when he read it himself. However, when the examiner read to him, he was able to comprehend the story detail through the sixth grade level.

In spelling he earned a total grade score of 3.3 He appeared to use revisualization of words to aid him in spelling. However, his phonics were quite weak. In the written expression he "gave up during this exercise, would not produce a sample that could be used as a valid measure of his ability."

The conclusion of this educational evaluator, Judith Tolson, was that there appears "to be a severe discrepancy between his ability which is at the superior range of intellectual functioning and his academic achievement. Academically, he is instructional at a third grade level in reading, has specific difficulties with word analysis and a limited sight vocabulary. Arithmetic function was at the fifth level. Spelling skills were weak and written expression extremely low." No statement was made as to recognizing the degree of the learning disability present in this performance.

III. DISCUSSION OF CURRENT PSYCHIATRIC EVALUATION

Behavioral Observations. Alex is a good-looking boy. He is generally open and direct. He tended to blame happenings on others, though he admitted that he could act out in school to get his own way. Much of his current conflict he put on his father, particularly over a hassle which they had had in regard to purchasing a dirt bike. Alex had asked for a smaller 80 CC bike, but his father reasoned that he would soon outgrow that particular model and bought a much larger 100 CC model for him. The father said, "I think he should be grateful, and I can't perceive why he has this much anger at me for buying the bigger bike." From the son's point of view, the father had not listened to him, had put him on a bigger bike which he could not manage, and had put him into several life-threatening situations because of his inability to handle the bigger bike. "I just couldn't ride that fast on that bike and keep it under control. I am mad because he didn't listen to me when I told him what I thought I could handle." (This kind of incident seems to point up some of the problems in the communication between the father and son. The father wants to be an effective father, and in some ways puts a higher expectation on the son than the son can achieve. At the same time, he has a hard time listening to what the son feels he can handle. The son, on the other hand, feels that the father is totally out of touch with him and that they are like two ships passing in the night, in the fact that they have little communication between them.)

Response to Bender-Gestalt Visual Motor Test. Alex was able to complete all of the Bender-Gestalt Visual Motor figures quite well. There was no indication of problems in angulation or simplification which would suggest a visual-motor process problem. The one striking feature of his response was the fact that the figures were made on a very small scale. It was as though they were constricted in an effort to control and contain the underlying emotionality. They were done in good order and sequence, appeared neatly finished on the page, and done with considerable accuracy. The overall quality of the drawing reflected superior mental functioning.

Response to House-Tree-Person Drawings. The house was done rather skillfully. However, it is significant that the house takes on a somewhat bare, bleak appearance. Also, there is no baseline or ground line to the house, which you would usually see in children 8 or 9 years of age or older. Both the absence of a ground line and the bleakness and barreness would tend to point up conflictual feelings he has about his mother, his father, and his living situation past and present.

His story about the house was as follows: "It is an old house, ready to be destroyed. It is very old. Some old people are trying to keep it together. (How does the story end?) That the people save the house." (The symbolism in this story would seem to reflect that Alex is concerned about the relationship he is having in his home, and some of the feelings that destruction is possible. He apparently sees efforts being made by the "old people", which would include his father and this clinician, as trying to keep things together. He has a positive outcome to his story.)

Alex's drawing of a tree is quite good. The symbolism is clear and the quality shows artistic perceptiveness. However, once again, a ground line is absent and the tree is drawn as if it is suspended in the air. One could only surmise that this is reflective of some of the disturbances in his early beginnings and that he still has basic insecurities with which he's struggling.

His story of the tree was as follows: "It is an old tree in a big field. Nobody has seen it before except one person. (Who was that?) Me. Nobody's ever going to see it again. (How does your story end?) Noone sees it. It is at the end of the world and the tree will be blown up when the world blows up."

(This story is in marked contrast to the quality of the tree. The tree is actually beautifully placed on the page and well done. The story is an ominous one, suggesting great inner conflict and confusion. It also suggests that Alex can be a secretive person, keeping things strongly inside himself. The symbolism of the tree is representative of both maternal and paternal issues, and the story suggest that no one truly sees his parents as he sees them. The ending of the story is disturbing in that it implies that the parents will never truly get together in a parenting role for him and that there can only be some kind of end of the world destruction in relationship to his ties to them. On the basis of these observations, as well as the social history, it would appear that therapy and individual counseling would be important to help him find alternative ways of viewing his life situation.)

Alex's drawing of a person is also reflective of some of his inner struggles. The drawing stands about two inches high. It appears that the little boy is wearing a cap which is pulled down over his left eye so that it's difficult to see clearly his facial expression and his feelings. Alex identified the figure as that of a boy, 8 years of age, who was happy because he "was living with his parents." The body image as it is drawn is intact, though he has shown just three fingers on his left and right hand instead of the usual number. Also, there is a slight distortion in the head size, such that the head appears to be large and out of proportion in relationship to the rest of the body. This is sometimes seen as the subject's preoccupation with things related to the brain, to learning, and to emotions which are seated within the brain function.

Response to Reading. When asked to read material at a third to fourth grade level, significantly below the seventh to eighth level where he is seated, Alex did show work recognition problems. He miscalled several words but could correct his mistakes. Often in his reading he would have one word running off into the next word. Word recognition became increasingly difficult above the third to fourth level, and he was not able to comprehend and understand when he read silently to himself. When read to Alex was able to comprehend up to a sixth year level and above. Alex had difficulty in his spelling of more complex words. Some of the mistakes which he made pointed up phonetic spelling but difficulty in visual recall of these words: family was spelled famili; language spelled langue; elephant was spelled elefent; tongue was spelled tonge; afternoon was spelled afternon (with one o); troubled was spelled trobled; and vegetable was spelled vegetudel.

Response to Writing Sample. It was in this area of written expression that Alex had his greatest difficulty. Earlier, when I had asked him about what he would like to be when he grew up, he had indicated he'd like to be in the Air Force, and he had wanted to be an astronaut since he was 8 years of age. I then asked him to write a few sentences for me on "Why I would like to be an astronaut." Alex wrote the following sentence: "It would be exiding exprioinsin." He was clearly upset at his inability to write out what he wanted to say which was "It would be an exciting experience." It was also distressing to see how handicapped he was by this language dysfunction with which he has been struggling from an early age. And while the bilingual problem has certainly compounded his struggles to master the English language, it was equally clear that he had not mastered Spanish that well, also. I did take out a Spanish primer and asked him about some of the common Spanish words and letters, very few of which he was able to read, recognize, or to translate. Hence, it appears that the primary problem is a specific learning disability of the dyslexia type effecting both this word recognition and his written expression language skills.

Response to Mathematics. In order to check out Alex's math levels I did have him do some simple arithmetic computation - addition, subtraction, multiplication, division, fractions, and percentages. Generally, he was able to handle all of these operations up through the sixth and into the seventh levels.

IV. CONCLUSIONS AND RECOMMENDATIONS

A. Alex is a 13 year-old boy who has had a combination of difficulties stemming back to the family system problems, the separation and divorce of his parents, living in South America from ages 6 to 9 years, and subsequent difficulties in communication with his father since returning to the United States and living with him in the summer of 1980.

B. Assets. Alex is a handsome boy. It is also apparent that he is a bright-normal to superior young man in terms of his intellectual endowment. He makes friends easily, is popular among teenagers, and is struggling to find an identity with which he can be comfortable.

C. Deficits. Alex's primary problem appears to be the lack of intactness in the central nervous system leading to dyslexia which includes word recognition problems, written expression problems and problems in spelling. The source and origin of the lack of intactness is not clear. It is possible related to a genetic pattern or to very subtle neurologic impairment which has been difficult to isolate and to pinpoint. The history of some perinatal distress would suggest this second possibility.

Associated with the lack of intactness and the dyslexia has been an emotional concomitant related to the narcissistic wound. This has strongly influenced his feelings of self-esteem, his sense of worth, and his sense of desire in the academic learning areas.

Finally, there are significant family system problems which have been added on to his primary and secondary problems described above.

D. Recommendations. In view of the degree of language functioning problem it is strongly recommended that Alex attend the Landmark School in Prides Crossing, Mass., which is the educational component of the Learning Disabilities Foundation, Inc. This program is "designed to help young people of promise to realize their full language or its potential, and therefore is especially intensive in programming on the mastering of skills of reading, writing, spelling, and composition. All of these areas are areas in which Alex is extremely weak.

The second recommendation is that Alex and his father have ongoing counseling in order to improve the quality of communication between them. This could be done prior to Alex's leaving for Landmark School and on the occasions of his returning for vacations.

When he has progressed sufficiently for a high school placement and appears to have strengthened his language are skills, one could consider the Hilltop School where he could function as a day student.

E. Clinical Impression.

Axis I	Attention Deficit Disorder without hyperactivity, DSM III 314.00.
Axis II	Specific Developmental Disorder, with Dyslexia as manifest in word recognition, writing skills, and in spelling, DSM III 315.31.
Axis III	No apparent neurologic impairment, but this needs to be considered, along with the genetic origin for the pattern of dyslexia.
Axis IV	Psychosocial stressor level 4, moderate, due to conflict between his parents, his early life in South America ages 6 to 9 years, and his present conflict and difficulty in communication with his father.
Axis V	Functional adaptive level 3, good with peers; level 4 fair to poor at home with father.

Examiner: William C. Adamson, M.D.
Professor of Child/
Adolescent Psychiatry
Hahnemann University
Phila., Pa.

SCHOOL DISTRICT
EXHIBIT 15

Central Bucks School District.
Doylestown, Pennsylvania

August 10, 1983

Mr. Russell Muth
66 Springs Drive
Doylestown, PA 18901

Dear Mr. Muth:

As you requested during our August 8, 1983 telephone conversation, this communication is designed to summarize our program planning meeting held on June 17, 1983.

Subsequent to your first meeting with me on February 23, 1983 in which you described your displeasure with the LD program at Lenape Junior High School, meetings with the IEP planning team were held on March 11, April 7, and June 17, 1983. Strategies for both home and school were discussed and implemented as a result of these meetings. The final meeting was designed to make recommendations for the 1983-84 school year.

Essentially, the IEP team recommended continuation of Alex in the Learning Disability program at Lenape Junior High with an IEP conference to be held in September to consider an increase of time in the LD room. As you are keenly aware, Alex repeatedly expressed concerns about being different and at one point during the year (March '83) it was determined appropriate to implement some mainstreaming into the team classes for English and science. This was done on a diagnostic basis in an effort to address our concerns with Alex's lack of motivation and demonstration of emotional distress. For next year, it was felt that Alex may need to be pulled back into the LD program for more time but we would want to give a few weeks to assess this need.

I believe I again communicated to you that based on the current diagnostic evidence available on Alex, he would continue to be considered a learning disabled child. Any change in placement would require a change in his diagnosis. Your consideration of a psychiatric evaluation performed by the school district was also recommended. It was also mentioned that the social worker assigned to Lenape would be facilitating group counseling sessions with students in the LD program, from which Alex might benefit.

It is my hope that the information provided herein is consistent with your perception of the meeting of June 17, 1983. If not, please respond with your comments.

Sincerely,

N. Robert Laws
Director of Pupil Services

SCHOOL DISTRICT
EXHIBIT 17

Russell A. Muth, Jr.
66 Springs Drive
Doylestown, Pennsylvania
18901

September 6, 1983

Dr. N. Robert Laws
Central Bucks School District
Administration Center
315 West State Street
Doylestown, PA 18901

Reference: R. Alexander Muth
Lenape Junior High School

Dear Dr. Laws:

Since Alexander's admission to the Landmark School is undecided and he will be returning to Lenape Junior High School on Thursday, I request a meeting with you to re-write Alexander's I.E.P. to reflect his current needs and to create a program which properly addresses his disability. His present I.E.P. is woefully unsatisfactory.

I look forward to hearing from you.

Respectfully yours,

/s/Russell A. Muth, Jr.

P.S. The material you promised me earlier in the summer has never been transmitted to me.

CENTRAL BUCKS
EXHIBIT 1

DUE PROCESS NOTES OF TESTIMONY, SEPTEMBER 30, 1983:

p. 8, l. 16-20

MRS. SOMMERS': We will show that the education which Alexander received and would receive at the Central Bucks School District is entirely appropriate and that there is no necessity for Alexander's placement outside the school district.

...

p. 27, l. 25 to p. 28, l. 16

CHARLES M. NEILL, having been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MS. SOMMER:

Q. Mr. Neill, by whom are you employed?

A. Central Bucks School District.

Q. In what capacity?

A. As supervisor of special education.

. . .

p.29, l. 3-8

Q. And in connection with your duties as the supervisor for the special education program, do you have occasion to be involved in the development of the individualized educational programs for the special education children?

A. Yes.

. . .

p.30, l. 2-5

Q. Did you have occasion to be involved in the development of the I.E.P. for Alexander Muth?

A. I have been involved on conferencing and I.E.P. planning sessions.

. . .

p.31, l. 21 to p. 32, l. 16

Q. Are you familiar with the learning disability program, the individualized educational program developed for Alexander?

A. Yes, I am.

Q. And in your opinion, why is this program appropriate?

A. According to our evaluations and according to state definitions of standards, our current program is appropriate for Alex.

Q. Why?

A. We can support him in terms of specific learning needs and in the learning resource room and mainstream him where appropriate.

Q. And has that been done?

A. Yes it has.

MS. SOMMER: I have no other questions.

THE HEARING OFFICER: Mr. Muth.

MR. MUTH: Yes.

...

p. 35, l. 16 to p. 36, l. 23

BY MR. MUTH:

Q. Mr. Neill, in your evaluation of Alexander Muth for special education, various programs, what were the major areas of special ed that the child was to receive above normal curriculum forwarded to a Central Bucks child?

A. He received nothing above anything that is offered for any child in the program.

Q. We have two classes of children, probably more than that in Central Bucks School. We have a child who comes through, who is perfectly normal and receives a regular education and then you have a child with a number of neurological deficits who has to receive various types of special training.

Now, I would like to know, I am asking you what were the deficits that you had to address as a supervisor on Alexander Muth so that I can get to the section of variability?

THE HEARING OFFICER: Let me interject again. I think that Mr. Neill as a supervisor would only be involved with the administrative end of the I.E.P. Those individuals who did the evaluations, the specialized evaluations on Alexander probably participated in writing the actual I.E.P. so that he probably cannot answer the question that you are asking.

BY MR. MUTH:

Q. Well, specifically what I am trying to drive at is that --

MS. SOMMER: I object to him telling us.

. . .

p. 37, l. 9 to p. 38, l. 17

BY MR. MUTH:

Q. Mr. Neill, when I admitted my son to the school district he was evaluated for a number of deficiencies which he had one which was called speech and language deficiencies and initially it was considered very important for the child to have speech therapy from a practitioner of the Intermediate Unit.

Now, I would like to know why the child was yanked out of that program without informing me and why it was necessary for me, the parent, to have to come back and put the child back in the program? I am asking why the supervisor of his educational program did not fulfill that obligation, why the weight was pressed on myself?

MS. SOMMER: I object on the basis that as you said before we are not here to decide what he got in the past. We are here to decide whether the I.E.P. that is in effect or would be in effect if Alexander were in our school district at present, which he is not, whether that I.E.P. and whether the education we propose for Alexander would be appropriate. Whether we can provide an appropriate education, not whether there was something in the past that Mr. Muth decided is inappropriate.

THE HEARING OFFICER: The current program that Alexander is in, does it offer speech and language therapy as part of the I.E.P.?

THE WITNESS: I would have to see the I.E.P. I'm not aware of that from memory.

THE HEARING OFFICER: At this time I think that the I.E.P. should be presented and entered as evidence.

. . .

p. 41, l/ 16 to p. 41, l. 21

JUDITH A. TOLSON, having been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

. . .

p. 53, l. 6

CROSS -EXAMINATION

. . .

p. 55, l. 11 to p. 56, l. 4

Q. Okay, you expressed an opinion in your testimony that there is a wide discrepancy between his ability and his performance. In your evaluation and testing, were you able to determine what the cause of that situation was?

A. The exact cause, well, during the testing and from reviewing all the different records and all the different materials that we have had or the information we have, I would say that because he has an auditory processing difficulty, this has caused him difficulty in reading, math and all the academic subjects.

Q. Okay, who initiated the request for the perceptual hearing tests?

A. Who initiated the request, I think you did.

Q. That is correct. Why was the hearing perception test delayed until the child was in this third year in the school system?

A. I can't answer that.

...

p. 62, l. 20 to p. 68, l. 7

MS. SOMMER: Elizabeth Fallon.

ELIZABETH FALLON, having been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MS. SOMMER:

Q. Miss Fallon, what is your educational background?

A. I have a bachelor's degree in psychology. I have a master's in educational psychology from Temple. I have been accepted in the doctoral program in school psychology and I have taken some courses in that regard. I am certified as a school psychologist in Pennsylvania and New Jersey.

Q. What is your work history?

A. I have worked for the Central Bucks School District as a school psychologist since January of 1975. I also performed a semester's internship at the Woods Schools working primarily with their learning disabilities program and Dr. Jerry Goldman.

Q. So you have been with the Central Bucks School District as a school psychologist since 1975?

A. Yes.

Q. Since 1975 and during your internship at the Woods Schools, approximately how many students would you estimate that you have worked with?

A. Eight hundred, 900.

Q. Would you describe your job responsibilities with the Central Bucks School District?

A. Children who are having difficulties in school for one reason or another are referred to me. I perform a battery of tests and/or interview, it is essentially diagnostic. I then consult with the school personnel regarding the results and also with the parent, making recommendations for placement, therapy, whatever. I also do a variety of other things such as testing for the gifted program, working individually one-to-one with some of the children.

Q. Do you know Alexander Muth?

A. Yes.

Q. When did you have your first contact with Alexander?

A. The first contact was in March of 1981.

Q. Why were you called on?

A. Mr. Muth had concerns because Alex was having some problems of adjustment in his learning disabilities class. He felt, Mr. Muth felt that it was as a result of a personality conflict between Alex and his LD teacher. I was asked to talk with Alex and come to a conclusion about what the problem might be and what the source of it was.

Q. Did you perform a psychological evaluation at that time?

A. Yes. He had just not long before that been completely evaluated, so what I did was give him a Wide Range Achievement Text to get some idea of where he was academically and also some projective techniques to get some idea of how he was functioning emotionally. I also interviewed him and the teacher and talked with all the school personnel involved trying to get to the basis of the problem.

Q. As a result of the testing and the interviewing that you did and the review of the various records that you did, did you write a report?

A. Yes.

MS. SOMMER: I would ask that the March 13, 1981 psychological consultation report be admitted into evidence.

(Above-mentioned document marked SD-12 for identification and received into evidence.)

BY MS. SOMMER:

Q. What were the results of the test that you administered?

A. Well, I found that the original question was did Alex indeed have a conflict with the teacher and that was his problem in the classroom and Alex had a problem with self-esteem. He felt uncomfortable being in a learning disabilities class and he blamed the teacher for his being there and that was the conflict, if that could be so called.

I recommended that he be continued in his present academic setting, that periodic sessions with the school guidance counselor be started so that he could talk about his concerns and then also, these could be discussed with Mr. Muth.

Q. Did your testing results indicate or did you come to a diagnosis as to his educational problem?

A. At that time?

Q. Yes.

A. It was obvious that he had a learning disability, but that diagnosis per se had been made prior to that by the private psychologist who had seen him previously before he came to Kutz.

Q. And that private psychologist had been employed by Mr. Muth; is that correct?

A. Yes.

THE HEARING OFFICER: Do we have copies of that psychological evaluation?

MS. SOMMER: Yes, I do. I only have this copy, so I just ask to make a copy before you take it.

(Above-mentioned document marked SD-13 for identification and received into evidence.)

BY MS. SOMMER:

Q. Now, approximately how many times did you meet with Alexander when performing the tests and interviewing him regarding some of the problems he was having in school at the time of this psychological evaluation in March of '81?

A. At that time, I saw him on a couple of occasions and also talked with his father as well as the school personnel.

Q. What were your observations about Alexander's behavior?

A. Behavior during the time I was talking with him?

Q. Yes.

A. He was shy, quiet, soft-spoken young man. He openly talked about his experiences. He had a lot of concerns about primarily at that time being in the learning disabilities class. He was also a relatively new student making a lot of adjustments and wanted to be as much "normal" as possible. He was just a lovable little boy actually who wanted to be part of the mainstream and felt that he was being denied that for no reasons of his own and he was focusing at that time on the teacher as the person who was making him be in the learning disabilities class and making him be, as it were, not normal.

. . .

p. 69, l. 18-22

Q. Did Alexander tell you about any emotional or family problems that he was having?

A. He expressed concern that his father sometimes got home late and he was alone and he worried about it, yes, at that time.

. . .

p. 70, l. 17 to p. 75, l. 24

BY MS. SOMMER:

Q. Now, the evaluation that you did in February, would you describe that?

A. I did a Wechsler Intelligence Test for Children Revised, the same test he had been given before entering in 1980. The test scores were verbal 98, performance 139 and full scale 120. They are higher scores than the previous two testings which had taken place two years, almost two years before.

However, the differential between verbal and performance remained approximately the same. I also gave him the Visual Oral Digit Span Test, which is a visual oral cross motile memory kind of test, the Wide Range Achievement, sentence completion.

Q. What were the results of those tests?

A. The results indicated, essentially the WISC-R, the configuration, the high, significantly lower verbal than performance score is suggestive of one of three things, either an auditory problem, an emotional problem or a cultural deprivation.

Now, Alex's background included three and a half years living in South America speaking in a different language. One would expect a child under those circumstances to have a lower verbal, to have some problem with the language.

Q. Did you notice whether or not Alex spoke with an accent?

A. No, he did not. I think that the increase in the scores could be attributable to the fact that he had had a great deal more exposure in that approximately two-year period to the culture, but there is a definite indication of a language and auditory processing problem, learning disability there in addition.

Q. As a result of the tests and the evaluation, did you also interview Alex?

A. Oh yes.

Q. And what did your interview consist of, what did you talk to him about?

A. Well, we would talk about essentially, I want to know after giving him tests, I gave him the sentence completion test, which is, I would begin a sentence and he would end it and sometimes we can take off from there after I have completed it with some indication of concerns that he might be having.

Q. Did he express any concerns to you?

A. He at that point -- I was particularly interested in his feelings about going into junior high. He had reserve about going, yet on the other hand his friends were going, his perception was he wanted to go with them and it didn't seem he had any more than the ordinary concern of many sixth graders about going into a junior high setting.

Q. As of February of '82, did your psychological testing go into the I.E.P. which was established in March of '82?

A. On the 3rd of March we had a child study team meeting in which a variety of people who are here were in attendance. At that time my report was reviewed, others who had worked with Alex gave their input and we came up with a recommendation for Alex to be placed in either the Lenape Junior High School learning disabilities program or a private school, the Valley Day program and that was considered because of some of the conflicts and emotional concerns that Alex seemed to be expressing.

Q. What kind of conflicts and emotional concerns?

A. Well, many of them had to do with the fact that he did not feel secure at home. He was not -- he mentioned on may occasions to me that he -- well, his father had said that he didn't have enough money to keep him and he was afraid if he went to his mother, his mother wouldn't have enough money to keep him and what woud happen to him and he had a great number of concerns of this kind.

I met with him during the period of the spring of 1982 and last June, approximately I had 40 contacts with him and his father together, the two of them, either letters, phone conversations, interviews with Alex and during the course of that time he expressed a great deal of concern about such things as my father doesn't love me, he doesn't care about me, he is never home, that kind of thing.

Q. Now, at the child study team meeting, you were present and put your own input and opinions into that; is that correct?

A. Yes.

Q. After the child study team meeting, did you meet with Mr. Muth to advise him of the test results and the team meeting analysis?

A. Yes, I met with him on the 23rd of March of 1982 to give him feedback of both my test results and the child study meeting. I suggested that he meet with Charlie Lang who was then the director of special education, he is no longer in the district, regarding the two alternatives that we were proposing, Lenape's program or Valley Day. I suggested that could go with Mr. Lang to Lenape to look at that program and/or to Valley Day to look at that program and make a decision.

Q. What is the difference between the Valley Day program and the Lenape program?

A. We were recommending Valley Day primarily because they have ongoing crisis counseling.

Q. And why do you believe that was important?

A. Because Alex consistently during the time that he has been in the school district, one of his biggest problems is motivation. There are times when he will come into school and just refuses to work. We have one-to-one tutors sit with him, warm, supportive people trying to get him and he just absolutely refuses to pick up the pencil or do anything and on occasion he will talk about some of the things that are concerning him at that time and on occasion he won't, he just doesn't work.

Q. Did you have occasion to discuss Alex's emotional concerns and the expression of them with Mr. Muth?

A. Oh yes. I tried to make a note on each occasion when I got a note from Mr. Muth or when I called him or he called me and I have these contacts all briefly annotated here.

Q. Did Mr. Muth ever express to you his own concern about his inability to parent the child?

A. He expressed a great number of concerns about the fact that he was a single parent and that how difficult it was and he certainly didn't want to remarry just to have a mother for the child even though that he knows that that would help him and it would be necessary to have somebody at home.

He also mentioned that maybe as a last resort he would have to put Alex up for adoption.

. . .

p. 77, l. 7 to p. 80, l. 17

Q. Prior to the decision in March of 1983 to mainstream Alexander, what discussions did you have with Alexander about the mainstreaming?

A. One of the reasons that we -- well, during the March conference we discussed the mainstreaming and one of the reasons that that came up was because Alex was becoming more and more withdrawn I guess is a good word, sad. Every time I saw him he would put his head down on the desk and say I don't like to here, I'll never get out of that LD class and he particularly mentioned another child in the class that had been mainstreamed and he was convinced he could do at least as well as this other child and wanted very much to go into mainstream for at least a couple of subjects.

Q. And you expressed this to the team?

A. On yes, absolutely. We discussed it, everyone had their input as far as you know, what was necessary for Alex and that of course his emotional state at that point was of some concern to us.

Q. After Alexander was mainstreamed in science and English in March 11th, 1983, you monitored him pretty closely?

A. Yes.

Q. And who else did you talk to about his progress?

A. I talked to his two mainstream teachers, also Mr. Talerico, who is his LD teacher. I particularly talked to the mainstream teachers on those occasions and they became more and more frequent when Alex would come into me and I would ask him about how things were going and he would say fine, everything is just fine, I did well today and I got my homework done and I picked up my assignment sheet, which he was supposed to do every morning to get checked up, so I knew he didn't pick up the assignment sheet, so I went to the teachers to see what he was doing and apparently he started off well and he had several absences and the progress became, again, erratic and he would sometimes -- he would come in unhappy and sometimes refuse to do any work.

Q. What kind of support periods were offered to Alexander with his mainstreaming?

A. I have his schedule here.

He went into the LD class to have individual help. It lcoks like three times a week here, I am really forgetting how much individual help he got in the class, it looks like three times a week.

Q. And that individual help was for the mainstream subjects?

A. Yes, in the LD class.

Q. Did he also receive LD instruction?

A. Oh yes. He went in there for all his other major subjects. He was in an LD program with the exception of these two mainstreams and he was mainstreamed into a team section which is a smaller group with team teaching, a lot of individualized attention anyway and then he was given support periods with the LD teacher to help out with those two subjects. In other words, getting him out into the mainstream, let him feel like a normal child as it were his big thing and also give him the LD support and see what would happen.

Q. Now, prior to the mainstreaming in 1983, did Alexander appear sad because he was not being mainstreamed?

A. Yes, very much.

Q. And is it fair to say that he was also pretty depressed?

A. Well, I don't know that we could put a clinical depression on him, but he was sad and was withdrawing to some extent, yes.

Q. Did you ever receive any communication from Mr. Muth about Alex being suicidal?

A. Yes. On February 3, 1983, Mr. Muth called and said that Alex was suicidal and I was surprised at this. I asked him what made him feel that way and he said that he had broken into the garage and taken his bike which had faulty brakes on the highway and that as far as he was concerned that would suggest that he was suicidal. I talked about his feelings and I suggested that an appointment with the district psychiatric consultant might be in order.

...

p. 83, l. 24 to p. 84, l. 20

Q. Now, in June of 1983, was there a planning conference to determine whether the mainstreaming should be continued?

A. Yes.

Q. And were you present at that conference?

A. Yes, I was.

Q. What was the purpose of the conference?

A. To discover if the mainstreaming had been successful, whether it should be continued. We concluded that it had not. The original purpose was to try to provide some motivation for Alex within the limited -- we didn't want to take him out of the LD class because he is an LD child, he needed the LD structure, so we provided the team for two subjects with LD help and even that was too much for him and we decided we would not suggest that it be continued.

Q. Did you discuss this or were you present in a discussion with Mr. Muth?

A. He attended the meeting, yes.

Q. And what was Mr. Muth's opinion about this?

A. He agreed that Alex should not be mainstreamed.

. . .

p. 87, l. 19 to p. 88, l. 7

THE HEARING OFFICER: Before you cross-examine, Mr. Muth. Mrs. Fallon, would you express to me the degree of Alex's learning disability relative to mild, moderate or severe?

THE WITNESS: Moderate.

THE HEARING OFFICER: And what about the emotional disturbance or emotional intrusions?

THE WITNESS: I think that his primary difficulty and inhibiting factor with learning is his learning disability. I think that the emotional intrusion fluctuates and when he absolutely refuses to work I would call it severe. On other days he can come in and perform and be well, an adjusted happy young man.

. . .

p. 100, l. 14-24

VINCENT S. TALERICO, having been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MS. SOMMER:

Q. Mr. Talerico, by whom are you employed?

A. The Central Bucks School District.

Q. In what capacity?

A. I'm a resource room teacher at the junior high level.

. . .

p. 101, l. 17 to p. 106, l. 3

Q. In connection with your teaching at the Lenape Junior High School, did you become involved with Alexander Muth?

A. Yes, I did.

Q. When was your first involvement?

A. I recall the first involvement was December of '82.

Q. And how did you become involved?

A. There was a move put forth to change some of the restrictions on the self-contained classroom to allow those children to flow more through the school and so the self-contained classroom and the resource room classroom was combined.

Q. What do you mean by self-contained classroom?

A. The students who were in the self-contained classroom attended there for all their major subjects, math, reading, language arts and social studies.

Q. Is this a special ed class?

A. Yes, it is.

Q. And specifically a learning disability class?

A. Yes.

Q. How many people were in the self-contained classroom?

A. At the time I recall there were 14. They were not always there though, so sometimes the seventh graders would be out at a special, meaning art, phys. ed, health, the eighth graders may be out. Generally at one time I would say there were no more than eight or nine there.

Q. Now, you said that there was going to be some provisions in allowing the children to flow through the school and how was this to be accomplished?

A. We combined our program so that I took all of the students for math and reading and the self-contained teacher took the students for science, social studies, language arts.

Q. How did you become involved with Alexander?

A. I started seeing Alexander approximately in December for math and reading at that time.

Q. Now, prior to March of 1983, can you describe Alexander's program?

A. According to the I.E.P.?

Q. Yes.

A. The program was based on the I.E.P. of the year previous which was then set up to remediate for phonetic difficulties in the area of math. I believe at that time it was set up for whole numbers.

Q. In March of '83, were there changes made?

A. Yes.

Q. And what were those changes?

A. Because of some feeling on Alex's part to want to be mainstreamed into the English class and science class, there was a change in his program to allow him to have that mainstreaming, still continue to see me for English --- or excuse me, for reading and math and also for support periods. He would have no contact with the self-contained teacher.

Q. Now, what do you mean by support periods and how often were they?

A. I believe the support periods were three times a week. The support periods were designed to allow Alex time to work on assignments given him in English and science. The time was also spent on allowing Alex to work on homework if the assignments were completed in the other areas.

Q. Was there a specific homework regimen established for Alexander?

A. At the outset of the program, Alex was to pick up a homework assignment slip from the guidance counselor every morning and his assignments in English and science were to be written on those, taken home, shown to his father, his father would sign the slip and the slip would be returned the following morning. Alex from the outset of the program failed to pick up the slip. I have no recollection if the slips were ever returned. I know Mr. Wagner, the guidance counselor, always had to seek Alex out to give him those slips.

Q. So that he did obtain the slips?

A. Yes.

Q. Was there a problem encountered with Alex and homework?

A. Yes, Alex at the beginning of the program was having a great deal of difficulty doing the required homework and subsequently it was set up that 15 minutes per night would be required.

Q. Now, the mainstreaming and the support groups were two of the changes that were effected; is that correct?

A. Yes.

Q. And there was also then that you took over in reading and math?

A. Yes.

Q. How did you perceive that these changes would help Alexander?

A. The changes I felt would help Alexander only in the area of self-esteem. I was skeptical about the mainstreaming given Alex's motivation that I had seen in the resource room in the areas of reading and math. His attention to task, his ability to complete work and I was very skeptical about his mainstreaming and what would be required of an LD student in the mainstreamed class.

Q. How much contact did you have with Alex on a day-to-day basis, what period of time?

A. I approximately saw Alex on an average of two periods per day. I would say that roughly would come out to about 90 minutes.

. . .

p. 110, l. 1 to p. 111, l. 17

Q. Were you able to observe improvement from March of '83 to the end of the year in Alexander's achievement?

A. Yes, I was.

Q. Describe those observations?

A. The observations were based on in-class performance on instructional materials and I felt they were corroborated by the end-of-the-year testing.

Q. How did Alexander fair with the mainstreaming?

A. He started the first two weeks and was able to, as I recollect, maintain and stay with the rest of the group, but a considerable deterioration followed after that. He was unwilling to put forth the effort to do the required assignments even on a one-to-one basis in the support periods, Alex did not want to put forth the effort. He wanted the answers or the materials to be covered, done by myself or the aide who was working with him rather than having Alex do it.

I want to point out also that there were other LD students in this mainstreamed classroom who were able to do the required assignments and did succeed.

Q. Now, you did mention that you worked with an aide. How much of Alexander's time would you say that the aide dealt with him?

A. The aide accompanied Alex to the English and the science classrooms, more times the English classroom to make sure that she could provide support in that classroom if Alex needed it. When she worked with me in the classroom, in the resource room, she would support Alex or I would support Alex whenever he had a difficulty. She also supported Alex during the support periods I believe two out of the three days.

Q. Now, who was this aide?

A. Mrs. Barbara Horn.

Q. And what were her qualifications?

A. She is a -- has a degree in the area of recreational education.

. . .

p. 112, l. 18 to p. 113, l. 2

Q. As a result of the unsuccessful experience with the mainstreaming, was there a modification of Alexander's program proposed in June?

A. Yes.

Q. And what was that modification?

A. It was felt that he would be best treated if he had increased time in the LD program, which means that he would not only see me for reading and math, but then attend the self-contained classroom for the other academic subjects.

...

p. 114, l. 23 to p. 118, l. 7

Q. Now, do you have an opinion as to what an appropriate educational program for Alexander would be?

A. Yes, I feel that Alex could best be served in a combination of the self-contained classroom and resource room setup that we have at Lenape Junior High School.

Q. Why do you believe that the mainstreaming concept is inappropriate for Alexander?

A. Alex lacks the consistent motivation to achieve in a class where specific requirements are laid out for a group of students. He is unable to follow through on assignments, to tend to what is going on in a large group of 18 to 22 students.

MS. SOMMER: No other questions.

THE HEARING OFFICER: Mr. Muth.

CROSS-EXAMINATION

BY MR. MUTH:

Q. You related in your testimony that the self-contained room and the resource room were combined. What was the motivating factor to restructure those two rooms into a single program?

MS. SOMMER: Objection.

THE HEARING OFFICER: Since Mr. Muth is a parent, I am going to allow him to continue with those questions. Go ahead.

THE WITNESS: It was felt in late November the one self-contained teacher as has been stated already, her father had died and a long-term substitute had taken her place. It was felt after the long-term substitute had been there that there was a great deal of difficulty with the feelings on the self-contained students that they had to be in one area through the day and would it be possible to combine my classroom and the self-contained classroom. I was agreeable to such move because it would provide less restriction and more of a less restrictive environment for those children.

BY MR. MUTH:

Q. Was it not felt that the very act of permitting those children to walk from class would be a very good method of alleviating the great deal of stress that the children were experiencing?

MS. SOMMER: Objection as to the stress portion.

THE HEARING OFFICER: Okay, we discussed the use of that term before. Would you rephrase that, Mr. Muth, if you can come up with a synonym?

BY MR. MUTH:

Q. Is it not true that it was felt that by giving the children an opportunity to walk between classes that this opportunity would alleviate them of the boredom of staying in one particular room for a long period of time?

A. The reason for the move was based on increasing their self-esteem through allowing them to travel through the halls from class to class as their peers did.

Q. You related in your testimony that after the March I.E.P. conference it was agreed by the district and the parent that support periods would be put into effect?

A. Yes.

Q. Were those support periods used to give Alexander tutoring by a certified learning disability teacher?

A. On occasion I provided some support to Alex during those support periods.

Q. Is it not true that the bulk of the so-called support was actually provided by the aide, one Mrs. Horn?

A. Yes.

Q. And did you reveal in your testimony that Mrs. Horn has a degree in recreation education?

A. Yes.

Q. Does Mrs. Horn have any specialized training academically in the field of learning disability?

A. No specialized training.

. . .

p. 124, l. 3 to p. 125, l. 9

THE HEARING OFFICER: I have one question. During the period of time you worked with Alex, he was being mainstreamed, he was not in a self-contained class?

THE WITNESS: He began the year in the self-contained class. The self-contained and the resource room were then combined in December when I started working with him, then he was mainstreamed in March and had no contact with the self-contained room.

THE HEARING OFFICER: Was there any marked differences in his behavior when in the self-contained class as opposed to when he was in the mainstreamed class?

THE WITNESS: General behavioral characteristics were constant throughout the year, although I would say there was an increase in frustratin and motivation when he was mainstreamed.

THE HEARING OFFICER: All right, thank you.

MS. SOMMER: Dr. Laws.

DR. N. ROBERT LAWS, having been duly sworn, was examined and testified as follows:

DIRECT-EXAMINATION

BY MS. SOMMER:

Q. By whom are you employed?

A. The Central Bucks School District.

Q. In what capacity?

A. I am director of pupil services.

...

p. 126, l. 25 to p. 128, l. 1

Q. At the programing planning conference on March 11, 1983, what took place at that conference?

A. Well, it was in fact a program planning I.E.P. conference to revise and modify Alexander's I.E.P.

Q. Was an effort made to place Alexander in a less restrictive environment?

A. In terms of mainstreaming him to a greater degree?

Q. Yes.

A. Yes. In fact, part of the need for revising Alexander's I.E.P. stemmed around my original conversation with Mr. Muth which essentially was that he was displeased with the one teacher that Alexander had. We then went into address that. Mrs. Fallon at the time had also commented that she was much concerned about Alexander's current emotional state, so we felt that a modification was in order. A modification included mainstreaming in two team subject areas.

Q. And did Mr. Muth --

A. I need to add, however, that that mainstreaming was done on a diagnostic basis. The team in fact --

Q. What does that mean?

A. Well, in fact we wanted to see if it would in fact help Alexander respond to our programing.

. . .

p. 139, l. 13 to p. 140, l. 23

BY MR. MUTH:

Q. You had related in your testimony that you had advised me to communicate with the Intermediate Unit in regard to the services that they could possible provide for learning disabled children, is this not correct?

A. That is correct, on a phone conversation of May 12th.

Q. Is it not true also that I attempted to communicate with the Intermediate Unit and they in turn referred me back to you?

A. I believe that was the chain of events.

Q. And that they refused to communicate with me at all because the Intermediate Unit only deals with the school district and not the parent?

A. I believe somewhere I saw a letter that you had received from Dr. Good at the Intermediate Unit, so I know that they did communicate with you. Exactly what they said to you I obviously wouldn't know.

MR. MUTH: I have no further questions.

THE HEARING OFFICER: Dr. Laws, before you leave, as of today, what program is Alexander in? Is he in full time or is he still in the resource room?

THE WITNESS: Well, Alexander is in the Landmark School in Boston.

THE HEARING OFFICER: Okay, if he were here, what program would he be in?

THE WITNESS; Okay, we would have by now revised his I.E.P. to reflect a full-time program were he to still be here. The mainstreaming we viewed to be not appropriate.

MS. SOMMER: No questions. That's all the evidence we have, sir.

. . .

p. 160, l. 11 to p. 160, l. 16

CHARLES M. NEILL, having been previously duly sworn, was examined and testified as follows:

CROSS-EXAMINATION

...

p. 164, l. 3 to p. 167, l. 7

BY MR. MUTH:

Q. Okay, my next question to Mr. Neill is why was there such an enormous delay in the auditory perception testing that really demonstrated that my son had an auditory perception deficit?

THE HEARING OFFICER: Okay, Mr. Muth, again, let me stop you. The delay, I am sure is significant, however, the diagnostic testing was completed and I do have that information.

MR. MUTH: What I am trying to establish, Mr. Tent, is the fact that the child was in the school district two and a half years before the appropriate testing was done, hence, the child did not have the opportunity to have an appropriate program created for him because the appropriate testing hadn't been completed.

MS. SOMMER: I object to that characterization.

THE HEARING OFFICER: Your objection is noted and again, we have to deal with the current placement and the current program that has been offered. We can't digress and discuss a program which is no longer in effect. We are here to determine whether his current program is appropriate.

BY MR. MUTH:

Q. Okay, I guess my final question to Mr. Neill is, I have asked for and my latest request with regard to this matter was on February 27, 1983, that the child receive tutoring in the Ortan/Gillingham method of remediation of the dyslexic condition that the child has. I would like to know why the school district rejected my request for the tutoring in the Ortan/Gillingham method?

MS. SOMMER: I object.

THE HEARING OFFICER: Again, your objection is noted. I think Mrs. Tolson who is familiar with the Ortan/Gillingham method testified that she is quite familiar with it and she did participate in the planning of the I.E.P. and the efficacy of the Ortan/Gillingham method is not of major importance at this time. That is not a program per se, but a method.

MR. MUTH: That is true, but it is the method of choice in the treatment of dyslexia.

THE HEARING OFFICER: Okay, ultimately the method or methods utilized are determined by the personnel running the programs and I am sure that in most cases they do not utilize one program. They use -- it is a collective approach and the Ortan/Gillingham method may or it may not have been one of the methods that was utilized. We are not here to discuss that.

MR. MUTH: Are you stating to me that the parent does not have the right to specify the type of training that his child will receive?

THE HEARING OFFICER: What I am suggesting to you is that the state sets minimum standards for a school district's employees and inherent in those standards is the assumption that these individuals are qualified to administer a specific program which deals with specific handicaps. If those individuals are teaching your son, then the assumption is that they are qualified.

MR. MUTH: What is at issue, Mr. Trent, I believe is whether the program is adequate as well as appropriate, so states the hearing officer's handbook. The question that would come up is what constitutes adequacy and that would have to do with regard to whether the child is being habilitated and remediated and at this point in time what we see is a spread of three and a half years between his reading level and his grade placement. This is the same spread he had when he came into the school system. So that whatever the school system is prescribing is not working, it is not adequate, it is not efficacious.

THE HEARING OFFICER: All right, do you have additional questions for Mr. Neill?

MR. MUTH: No, I don't.

. . .

p. 173, l. 4 to p. 174, l. 7

MR. MUTH: Okay, one of the things that I stated in my opening statement was that I did not feel the district was meeting the child's individual needs and to refute the fact that the district has claimed that they are meeting his individual needs, it would be necessary for me to question a number of individuals and attempt to establish the fact that if an adequate program was in effect, many of the behavioral problems that are seen in the child would no longer be manifested, but obviously I don't think you are going to let me try and establish that.

THE HEARING OFFICER: All right, what we have established is that children who have been diagnosed as LD also have secondary emotional problems. This is what you are stating now. Are you also suggesting that the school district is not addressing the emotional aspects of Alexander's learning disability?

MR. MUTH: I am saying if the appropriate program was in place one would not see the extensive emotional behavior that the child is manifesting.

THE HEARING OFFICER: All right, I did say that at the beginning of your testimony that the submission of evidence that you present should relate to me and to this body what you feel is an appropriate program. The school district has stated what it feels an appropriate program is.

. . .

p. 179, l. 14-20.

MR. MUTH: There are two other areas that I feel are germane to Alexander's situation. One is the amount of related services and the other issue has to do with motivation. Now, in my letter to Dr. Laws on February 27, 1983 --

MS. SOMMER: Is that a part of the record? It is not.

. . .

p. 181, l. 2 to p. 183, l. 22

MR. MUTH: Okay, in my letter of February 27, 1983, I requested that, "Temporarily, Alexander is to receive one-to-one teaching until the damage he has suffered from mid December through February has been repaired or transcended," and in earlier testimony by Mr. Talerico he related that most of the support services that were given to my son were actually given by an aide, Mrs. Horn and I believe that is an example of not giving the appropriate related services.

In addition, it is my point of view that the child should be receiving intense psychological counseling because the dyslexia was of a severe nature and that Mrs. Fallon had related that over the course of two years and please correct me if I have misheard you, that she has seen this child approximately 40 times and it is my particular feeling that the counseling should have been at least three times a week until the child's mental health is stabilized.

THE HEARING OFFICER: Do you have questions of Mr. Muth?

MS. SOMMER: Yes. Is he done?

MR. MUTH: Yes.

CROSS-EXAMINATION

BY MS. SOMMER:

Q. Mr. Muth, on this February 27, 1983 letter I notice on page two you have indicated that it is essential that Alexander be kept in his local junior high school to maintain his psychosocial milieu, that is what you said, did you not?

A. Yes, it was my belief at that point in time.

Q. And you would agree that absenteeism was a problem with Alexander?

A. Yes, it was a byproduct of the high stress atmosphere.

Q. Now, from whom did you determine that Alexander was in what you call a high stress atmosphere?

A. The child demonstrated a number of psychosomatic complaints, he was taken to Children's Hospital in Philadelphia. He was examined by an internist, a gastroenterologist there and that was where the opinion was rendered.

Q. And where is that opinion today?

A. The intimate details of my son's medical background are not part of this proceeding.

Q. Even though that they could and certainly in your opinion do become intimately involved with the educational system?

A. I believe, Miss Sommers, that in U.S. Code 1232(h), I am permitted to withhold private information such as that whenever I see fit.

Q. And it is true, is it not, that Dr. Adamson's report in no way indicates there are any kind of physical illnesses which are psychosomatic in nature?

A. I can't remember all eight pages of Dr. Adamson's report, so I can't answer that question.

Q. Did you hire Dr. Adamson to do this report?

A. Yes, I did.

Q. And how much did you pay him?

A. I'll tell you in a second. Three hundred and five dollars.

Q. And on how many occasions did you visit with Dr. Adamson?

A. I saw him three times and my son saw him three times.

. . .

p. 186, l. 3 to p. 187 l. 1

Q. Now, you requested psychological counseling for Alexander, did you not?

A. That is correct.

Q. And in fact when that was not agreed to by the district you did not get psychological counseling for Alex yourself?

A. In the --

Q. Yes or no, Mr. Muth, did you or did you not?

A. It was my opinion that under the terms and conditions of the responsibilities of the district that they should provide it. I could not afford it, let's put it that way.

Q. So you didn't?

A. I did not obtain it privately.

Q. Yet you have afforded to send him to the Landmark School?

A. I have been very fortunate and I have received funds in the month of September and I have funds due in the month of October which will allow me to at least get the child started in that school. Those funds were not available in the past.

MS. SOMMER: I have no other questions.

. . .

p. 187, l. 14 to p. 187, l. 21

ELIZABETH FALLON, having been previously duly sworn, was examined and testified as follows:

CROSS-EXAMINATION

BY MR. MUTH:

. . .

p. 192, l. 10-23

THE HEARING OFFICER: All right, let's take closing statements first from the school district, secondly, from Mr. Muth and I have stated the appeal procedure and I have issued written copies of that procedure. Ms. Sommer.

MS. SOMMER: Thank you, Mr. Trent. The school district of Central Bucks School District has presented evidence today and a substantial amount of evidence that they are dealing with the unique and specialized needs of Alexander Muth in a very personal and very appropriate way.

It has been totally uncontradicted that the program which the Central Bucks School District offers is appropriate.

. . .

p. 195, l. 7 to p. 197 l. 3

THE HEARING OFFICER: Mr. Muth.

MR. MUTH: As I stated in my opening remarks, I do not feel the Central Bucks School District is providing for my son's individualized needs. The basis of my stating that the needs are not being met rests in two areas. The first area is the fact that the very keystone, the very center point of the educational process is the development of reading skills. In the case of my son, Robert Alexander Muth, there has been no substantial growth in his reading ability and the spread between his grade placement and his functional reading level still remains at a disparity of three and a half years. This disparity is the essential reason that the child is not able to function appropriately in a regular classroom. The disparity also produces high stress defined as inordinate anxiety in the individual and the end result is that this high level of anxiety destroys the child's ability to be motivated towards the learning experience that is being presented to him.

Furthermore, the high stress atmosphere and the high anxiety which accompanies it is exacerbating -- I'm sorry, is exacerbating his mental problems to the point where it became necessary to remove him from the Central Bucks system and place him in a school where he is functioning in a very superior manner.

In addition, the Central Bucks School District has refused to give the proper amount of related services to the child. He has not received the amount of counseling which his situation requires and he has not received the appropriate one-to-one tutoring which is necessary for him to function appropriately in the classroom. I think that the district's representative has engaged in a large number of self-serving statements and declarations and that a considerable amount of my ability to produce countering testimony has been effectively blocked by the combination of the Hearing Officer and the district's representative.

My bottom line in regard to this situation is that there is essentially no growth and that now that the child has been placed into another learning situation, the inappropriate behavior has ceased and the academic growth has developed quite nicely.

PLAINTIFF'S EXHIBIT 1

DUE PROCESS HEARING
September 30, 1983
10:15 A.M.
for Robert Alexander Muth

A hearing in the above entitled matter was held on the above date at the Central Bucks Administration Building, Route 202, Doylestown, Pennsylvania
Before: Vernard Trent, Hearing Officer
Date of Decision: October 31, 1983

HEARING OFFICER'S REPORT

1. Names and Functions of Those Attending the Hearing:

The names of those attending the hearing are listed on page two (2) of the transcript.

2. List of Exhibits:

Exhibits are listed on page three (3) of the transcript.

3. Background of Hearing and Terse Statement of the Position of Each Side:

Robert Alexander Muth is a student in the Central Bucks School District, diagnosed a learning disabled. According to Mr. Muth (N.T. p.9), "the Central Bucks School District in conjunction with IU#22 has failed to provide my son, Robert Alexander Muth, with an appropriate program of special education in a class which will address the student's individual and educational needs as they are reflected by the student's exceptionality and resultant educational deficits." It was also stated (N.T. p.13) that "the Central Bucks School District has refused to supply the appropriate support or related services that were critically needed for Robert Alexander Muth." As such, a due process hearing was requested pursuant to 22 Pa. Code 13.33 (1)(iv) and 13.32 (9)-(24) to determine that appropriateness of the educational program.

The Central Bucks School District's position is "that Alexander Muth is receiving an appropriate education according to the state standards and federal requirements and that he is receiving this education in the least restrictive alternative." "The education which Alexander received and would receive at Central Bucks School District is entirely appropriate and that there is no necessity for Alexander's placement outside the school district" (N.T. p.8).

4. General Issues to be Resolved:

A. Determination if the recommended school district LD program is less than an appropriate program of education and training, thereby necessitating placement outside the school district.

B. Determination if appropriate support and related services were supplied.

5. Evidence Presented by the Parties

A. School District Evidence

Judith A. Tolson, Diagnostic Learning Consultant, discussed the results of a 3-2-83 educational evaluation which indicated specific strengths and weaknesses (N.T. p.45, SD-10). The Woodcock-Johnson Psycho-educational Battery yielded the following respective grade levels in reading, mathematics, and written language: 4.9, 6.4 and 3.9. These scores indicated a "severe discrepancy between Alexander's ability and his achievement" (SD-10 p.1). The Standard Reading Inventory indicated an instructional level of 32 while the Key Math Diagnostic Arithmetic Test indicated a grade score of 59. A grade level of 33 was recorded on the Test of Written Spelling and no score reported on Written Expression due to a lack of cooperation. Student behavior hampered accurate assessment (SD-10, p.3). Continuation in the L.D. class was recommended (N.T. p.47)

Evaluation by the district reading specialist divulged an instructional level of 4 (SD-11).

Initial psychological testing (9-26-80) by Thomas E. Akins, Ph.D. found "a child with a primary language disability/communication handicap with expressive and receptive features"

(SD-13). Subsequent psychological testing by the school district (3-13-81 & 2-25-82) portrayed a young man experiencing emotional duress due to reduced self esteem. Cognitive assessment (WISC-R) revealed functioning in the Average to Very Superior range of intelligence with a Verbal IQ of 98, Performance IQ 139 and Full Scale IQ of 120. Program recommendations by both psychologists alluded to the possibility of private school placement (SD-13 & 14).

An Auditory Language Processing examination (SD-3) by IU #22 suggested that Alexander has an auditory analysis problem. More specifically, an auditory analysis problem (inability to separate auditory units into parts) and an auditory synthesis problem (inability to blend component parts to form a meaningful unit such as syllables or sound to form words). Visual aids and auditory training were recommended. Speech and language testing (SD-6) indicated a need for continued language therapy.

Four (4) Individualized Education Program Plans (SD-2,7,8 & 9) were submitted. All four provided an LD Resource Room with speech and language therapy offered as a related service. The 3-11-83 I.E.P. offered mainstreaming in English and Science while the others (9/80-SD-F, 2/81-SD-8 & 3/82-SD-9) provided for mainstreaming in the related arts i.e. art, music, library and physical education.

B. Parent's Evidence

Mr. Muth, Alexander's father, was the only witness presented by the parents (N.T. p. 147). Over the objection of district counsel the qualification letter of Dr. Adamson (P-1) and psychiatric evaluation (P-2) were admitted as evidence (N.T. p. 143-149).

The psychiatric evaluation found Alexander's primary problem as "lack of intactness in the central nervous system leading to dyslexia which includes word recognition problems, written expression problems in spelling." The etiology was suggested as a genetic patterns or very subtle neurologic impairment. Associated with the primary condition was an "emotional concomitant related to the narcissistic wound" and "significant family system problems" (P-2, N.T. p.152).

Mr. Muth questioned the validity of the I.E.P. stating that it had "been manipulated inappropriately" (N.T.-162). Yet he admitted signing the

I.E.P. (N.T. 163). It was also noted that Alexander had been in the Central Bucks School District two and one half (2 1/2) years before receiving a central auditory processing evaluation (N.T. 164).

Questions were raised as to why the youngster did not receive tutoring in the Orton/Gillingham method of remediating dyslexia (N.T. p. 165 & 174).

Mr. Muth also questioned the amount of related services, the issue of Alexander's auditory perceptual dysfunction not being addressed (N.T. 164) and the emotionality being a function of an inappropriate program in school as well as his home life (N.T. 190).

6. Uncontested Facts:

That Alexander is a learning disabled student experiencing auditory perceptual dysfunction and secondary emotionality. Citations in section seven (7) below.

7. Findings of Fact:

Alexander is a learning disabled student experiencing auditory perceptual dysfunction and secondary emotionality (N.T. pp. 31-47-71-84-85-133-P2, SD3, SD12, SD13, SD14). The LD combined with the emotionality presented problems in educational programming, precipitating several conferences to make adjustments to the program (N.T. 16-17-18-20-21). It was noted that the student exhibited an "inability to work even one-on-one with an aide (N.T. p.18). The psychological report (SD-14) divulged a Verbal IQ of 98, Performance IQ 139, and a Full Scale IQ of 120. The psychologist noted intellectual functioning in the Average and Very

Superior range with a language disability continuing to impede academic progress. In addition, evidence of a diminished self esteem as well as depressive qualities was recorded. SD-14 also describes a significant lag in scholastic achievement. Discussions were held with the Child Study Team relative to placement in the LD program at Lenape Junior High or Valley Day, a private school for LD youngsters. Involvement in a professional counseling milieu was also recommended.

Psychiatric examination (P-2), reported the primary problem as a "lack of intactness in the central nervous system leading to dyslexia" with an "emotional concomitant related to the narcissistic wound" and "significant family system problems." P-2 also reported no apparent neurologic impairment. Private school placement was also recommended.

An Auditory Language Processing examination (SD-3) by IU #22 delineated auditory perceptual dysfunction in auditory analysis and auditory synthesis. Auditory training techniques and visual materials were recommended. The above mentioened evaluation was secured due to parental insistence (N.T. 55-56).

Evaluation by a Diagnostic Learning Consultant indicated highly significant academic underachievement (SD-10, N.T. 47-49). The following assessment data was reported: Woodcock-John Psycho-educational Battery, reading 4.9, math 6.4 and written language 3.9. Standard Reading Inventory, instructional level 32; Key Math Diagnostic Arithmetic Test, grade score

5.9; Written Language, spelling grade score 3.3. Test results may not be a true measure of academic ability (SD-10 p. 3). The reading specialist's report tells of factual recall ability which is appropriate to the third grade reading level. Inferential reasoning was very poor (SD-11). Written language and grammatic usage difficulty indicated a need for continued language therapy.

The I.E.P. (SD-2) and Notice of Recommended Assignment (SD-4) do not describe an appropriate program for Alexander's learning disabilities. Although the speech and language I.E.P. (SD-6) addresses the auditory perceptual dysfunction, this information has not been translated into instructional strategies and classroom activities. The social and emotional concerns are not addressed on the I.E.P. According to testimony, Alexander was mainstreamed on a diagnostic basis to see if he would respond to programming (N.T. p. 27). Behavioral success and adjustment was not evident in either the self contained room nor the resource room. Indeed, when mainstreamed, an increase in frustration was noted although general behavioral characteristics throughout the year was constant (N.T. p. 24).

Cognitive abilities range from average in the verbal cognitive domain to mentally gifted in the non-verbal cognitive domain as evidence by a Verbal IQ of 98 and a Performance IQ of 139. This represents a significant change in intellectual functioning-1980 Verbal IQ 75, Performance IQ 115 and Full Scale IQ 92. The change was attributed to exposure to the American language culture and educational activities

(SD-14). Yet, reading level discrepancies remain at approximately three and one half (3-1/2) years.

There is some evidence to indicate minimal brain dysfunction (P-2) and social and emotional disturbance (P-2, SD 12-13-14) but not severe B.I. or severe emotional disturbance.

There is evidence to suggest the need for a more restrictive educational setting. (P.2, SD-5-10-12-13-14 & 15).

8. Conclusions of Law

Alexander is a learning disabled child which is considered an exceptionality warranting special education under Pennsylvania law; 22 Pa. Code 341.1(iii) and according to evidence presented in SD-5, SD-10, SD-12, SD-13, SD-14, P.-2, N.T. 16-17-20-21-29-31-32-47-49-60-102. He has a significant deficiency in the acquisition of basic learning skills, such as motor skills and general learning difficulties. He also exhibits speech and language impairment (P-2, SD-2, SD-3, SD-6, SD-9, SD-12, SD-13, SD-14) according to 22 Pa. Code 341.1(ix). Associated with the learning disability are emotional intrusions (P-2, SD-12, SD-13, SD-14). He may have some level of brain dysfunction associated with CNS dysfunction (P-2) but it is not sufficient to warrant a classification of Brain Damages as denoted in 22 Pa. Code 341.1(i). Finally, Alexander's cognitive abilities range from average to mentally gifted. The latter (MG) is covered under 22 Pa. Code 341.1(iiii). The program (SD-2, SD-5) advocated by the school district is appropriate relative to classification but inappropriate relative to effectiveness and efficiency as required by 22 Pa. Code CH-13.11(a)(b).

9. Recommendations

A. That the Central Bucks School District, immediately, meet with the parents of Robert Alexander Muth to discuss and explore alternative placement in a more restrictive educational setting according to 22 Pa. Code 13.11. The student has not made appreciable gains in reading (SD-10, N.T. 60) and socio-emotional difficulties seemingly have been exacerbated by the current placement (N.T. 22-23-74-88-89-102-133-156-157-166 SD-14). Programmatic changes have not alleviated the emotional district or facilitated the acquisition of necessary academic-social and vocational skills.

B. That the significant auditory perceptual dysfunction addressed through the speech and language I.E.P. be translated into instructional strategies and classroom activities (SD-3-SD-4).

C. That the socio-emotional difficulties be addressed through intensive counseling-crisis intervention and an effective program of behavior modification. The parents should also be referred for family therapy.

D. Vocational counseling and guidance should be explored.

E. When developing a program for the youngster-consider his potential to function within the mentally gifted range and provide special activities or services not ordinarily provided in the regular program in accordance with 22 Pa. Code 341.1(iiii) - Mentally Gifted.

F. In so much as the Ortman/Gillingham Method is a technique of instruction in reading for the learning disabled and not a complete program, the parent's exception is dismissed.

DATED: October 31, 1983

HEARING OFFICER: Vernard Trent

PLAINTIFF'S
EXHIBIT 2

In the Department of Education
Commonwealth of Pennsylvania

In Re:

The Educational	:Special Education
Assignment of Robert	Opinion No. 227
Alexander M., a	:
student in the	
Central Bucks School	:
District	

BACKGROUND

Robert Alexander M. (Alexander) is a seventh grade learning disabled student, as that term is defined in 22 Pa. Code § 341.1(iii), who was placed in a special education program for the learning disabled during the 1980-81 school year, at Lenape Junior High School (Lenape) in the Central Bucks School District (district).

In March of 1983, an Individualized Education Program (IEP) was developed for Alexander proposing that his placement at Lenape continue for the 1983-84 school year, that Alexander be mainstreamed for English and science, and that he continue to receive resource room support in reading and mathematics. On March 11, 1983 the district issued a Notice of Recommended Assignment for the Lenape placement described above and sent it to Alexander's father. Alexander's father approved this placement and program proposal.

Prior to the implementation of the March 1983 IEP, several meetings were held between the multi-disciplinary team and Alexander's father due to Alexander's unsuccessful experience with mainstreaming during the 1982-83 school year. As a result of these meetings, in June of 1983, a modification of Alexander's March 1983 IEP was proposed by the district recommending that Alexander's mainstreaming be discontinued and that he be placed in a self-contained classroom for learning disabled youngsters.

On June 20, 1983 the district received a request for a due process hearing from Alexander's father because he disagreed with the district's proposed placement for Alexander. The due process hearing was held on September 30, 1983, to determine whether the district's proposed placement constituted an appropriate program of education, with appropriate support and related services; or whether Alexander's father was correct in his contention that the Lenape placement was not appropriate for Alexander and that private school placement outside the district must be secured.

The hearing officer rendered his decision on October 31, 1983. He found that the March 1983 IEP and NORA did not describe an appropriate program of special education for Alexander's learning disabilities and he recommended that the district place Alexander in a more restrictive educational setting. The hearing officer did not, however, order that Alexander be placed in a private school, nor did he find that the district was unable to provide Alexander with an appropriate education.

Due partially to the lack of specificity in the hearing officer's findings and recommendations, both Alexander's father and the district filed exceptions to the hearing officer's decision with the Secretary of Education. It is these exceptions which are the subject of the present appeal.

DISCUSSION

Alexander's father excepts to the recommendation of the hearing officer because of his failure to order a private school placement for Alexander.

The district replied to this exception stating, among other things, that there is no evidence on the record to support the contention by Alexander's father that the district has not and cannot provide an appropriate special education program for Alexander. Furthermore, the district contends that there has been no evidence presented to support the placement of Alexander in a private school setting.

The district concedes, in its Reply to Alexander's father's exceptions, just as it did by the testimony that it presented at the hearing, that the March 1983 IEP, as drafted, is not appropriate to address Alexander's special education needs. At the hearing, the district stated that it had proposed a more restrictive educational setting for Alexander in June of 1983, which modified the March 1983 IEP (N.T. 112-113). This modification was proposed as a result of several meetings between the district and Alexander's father which eventually ended with both parties in agreement that mainstreaming Alexander for certain subjects would only continue until early September of 1983, when a program planning conference would again be held to evaluate Alexander's educational needs. (N.T.

84). This more restrictive educational setting was determined to be necessary for Alexander because of an unsuccessful attempt to mainstream Alexander for certain courses during the 1982-83 school year.

Also, in its Reply, the district alleges that the evidence of record shows that the district is capable of providing a more restrictive educational setting for Alexander, as required by the hearing officer in his recommendations, and that the modifications it proposed in June of 1983, to the March 1983 IEP, constitute an appropriate program of special education for Alexander.

In addition to its Reply to Alexander's father's exceptions, the district also filed its own exceptions to the hearing officer's opinion, alleging that the findings of fact are inaccurate and incomplete due to the fact that the hearing officer failed to take into account the proposed education program offered to Alexander's father in June of 1983; which, as noted above, recommended a more restrictive learning environment for Alexander.

After a careful review of the record, we find that the district's exception, as to the hearing officer's failure to take into account the proposed modifications to the March 1983 IEP, is meritorious and we, therefore, sustain that exception. We reverse and remand to the district with instructions that the district proceed with the revision of the March 1983 IEP for Alexander regarding those modifications determined to be necessary to provide Alexander with an appropriate program of special education.

The hearing officer shall retain jurisdiction of this case and, if the district and Alexander's father cannot agree upon a revised IEP for Alexander, shall reconvene the hearing herein and subsequently make further findings of fact, conclusions of law and recommendations regarding whether or not the district's revised proposed placement is appropriate for Alexander.

Because we have reversed the hearing officers [sic] decision, due to his failure to decide the appropriateness of the district's modified program offer of June of 1983, we find it unnecessary, at this time, to deal with the other issues presented by both Alexander's father and the district. These issues, however, may be raised before the hearing officer at any reconvened hearing and may, of course, once again be raised here should the hearing officer's decision, again be challenged by either or both parties.

Accordingly, we make the following:

ORDER

This 23rd day of January 2984, it is hereby ordered that this matter be remanded to the hearing officer for further proceedings consistent with this opinion.

/s/ Robert C. Wilburn
Secretary of Education

SCHOOL DISTRICT
EXHIBIT 18

Central Bucks School District
Doylestown, Pennsylvania

May 1, 1984

Mr. Russell Muth, Jr.
66 Springs Drive
Doylestown, PA 18901

Dear Mr. Muth:

In compliance with your request of April 26, 1984, I am forwarding the enclosed additions to the original IEP developed on March 28, 1984 which address the areas of:

1. Adaptive physical education
2. Individual Tutorial services
3. Gifted program

I have also included a Notice of Recommended Assignment (NORA) with three (3) options for your consideration.

As indicated on the NORA, if you do not respond within 10 days, that action will indicate your approval of the program.

For your convenience, I have enclosed a self-addressed stamped envelope for the return of the NORA.

Sincerely,

/s/Charles M. Neill
Supervisor of
Special Education

CMN:je
Enclosures

cc: Mr. Vernard Trent
Mr. Thomas F.J. MacAniff
Ms. Joanne D. Sommer
Dr. N. Robert Laws
Mrs. Judith Tolson
Mrs. Joanne Leilich
Mr. Vince Talerico.

CENTRAL BUCKS
EXHIBIT 2

DUE PROCESS NOTES OF TESTIMONY OF JUNE 7, 1984

p. 3, l. 1-9

MR. TRENT: My name is Bernard Trent, and I am serving as the Hearing Officer and designee of the State Secretary of Education for The Commonwealth of Pennsylvania.

The purpose of this hearing is to resolve whether the Bucks County School District has offered an appropriate education program for Robert Alexander Muth and stated notice of assignment and I.E.P. of April of 1984.

p.8, 1.7 - p. 9, 1.15

MS. SOMMER: For the record, I would ask and move for the admission of the testimony of the December 30, 1983 hearing and ask that be incorporated into this record, including all of the exhibits that were presented at that time.

MR. MUTH: Objection.

MR. TRENT: I am going to allow the admissions and that evidence and testimony because this is a continuation of that hearing.

MR. MUTH: May I state my objections more formally?

MR. TRENT: The objection is noted and is in the record.

At this time the School District may present anything it has in the way of evidence and testimony. You will then have an opportunity to do likewise, Mr. Muth.

MS. SOMMER: At this time we would like to present the I.E.P. which was presented to Mr. Muth. It includes the Individualized Education Program itself in its present form which was developed on March 28, 1984.

It also includes the present education levels, the record of the test scores, as well as the 4/26/84 present educational level which reflects the meeting on April 26th with Mr. Muth. It also includes the cover sheet for the Individualized Education Program plan and a notice and recommended assignment which is dated April 26, 1984. It also includes a letter dated May 1, 1984, from Mr. Neill to Mr. Muth. Enclosed is an addition to the original I.E.P. developed on March 28th.

I would like to have this marked as SD-18 and have that made part of the record.

P. 35, l. 6 to p. 38, l. 1

BY MS. SOMMER:

Q. Ms. Tolson, what is your position with the Central Bucks School District?

A. Diagnostic Learning Consultant.

Q. Ms. Tolson, were you present at the March 28, 1984 planning meeting for an Individualized Education Program for Robert Alexander Muth?

A. yes.

Q. And also present at that time was Mr. Talerico?

A. Yes. Mr. Talerico and I went through the test data and classroom information and formulated a plan for Alex and presented it to the staff. And we were hoping for Mr. Muth's approval.

Q. What kind of test data did you receive?

A. I received my normal testing of the reading specialist at Lenape and psychological information that had been done.

Q. Including in the testing of Alex, was there an IQ test performed?

A. Yes, there was.

Q. And do you recall what the full scale IQ was?

A. The full scale IQ, I believe, was -- this is Mrs. Fallon's information and I don't have it with me right now. Oh, yes, I do.

The full scale IQ was 120.

Q. How is a full sccle arrived at?

A. It's arrived at by compiling the verbal scores and the performance scores. That's the WIS-R test.

Q. Do you recall when the WIS-R test was done?

A. Mrs. Fallon had done that testing February of 1982.

Q. And as of February of 1982 the full scale IQ was 120?

A. Yes, it was.

Q. Now, what other tests did you review?

A. We reviewed all of my testing that I had done in March of 1983 which was the most recent formal educational testing that had been done.

Q. Are your aware of the criteria in terms of IQ, a full scale IQ for the gifted program?

A. Yes.

Q. What is the criteria for the gifted program?

A. The full scale IQ is 130 plus as measured on that test.

Q. That's full scale?

A. Full scale, yes.

Q. Now, where you involved in the development of an Individualized Educational Program?

A. Yes, I was.

Q. In what way?

A. Mr. Talerico and I went through all of the information we had, and that included classroom performance and most recent information of the test data and we formulated a plan on his strengths and weaknesses.

And by doing so, we then decided on an objective for his I.E.P.

Q. Did you make a recommendation to the staff?

A. Yes. We suggested things that we felt would be appropriate for Alex.

Q. What kind of suggestions did you make?

A. Well, according to what information we had, we determined that certain areas that would be appropriate on the basis of his strength and weakness, specific academic areas and from that formulated a plan.

Q. In what way was this I.E.P. different from the March of 1983 I.E.P.?

A. This I.E.P. also includes an aspect of creativity, areas of work habits that we wanted to develop with Alex.

It also includes science and social studies which was not included in the other I.E.P.

Q. What was the difference between the program that was in effect in March of 1983 and what would be proposed in the I.E.P. program of March of 1984?

A. This program was more self-contained than the other program.

P. 40, 1.2 - p. 40, 1.18

BY MR. MUTH:

Q. I believe the record has clearly demonstrated that the child has a very high performance IQ, indicating that he is in the gifted area.

Can you or can you not, develop a gifted program which addresses this particular child's uniqueness and/or giftedness?

A. I believe that was addressed in the I.E.P.

Q. Could you explain where?

A. The additions to the recommendations that you asked for.

MR. TRENT: Excuse me for interjecting again, but I believe she did say they discussed science and, I believe, social studies. So that the creative aspect was addressed and then creativity, that addition to the I.E.P. that we had to the four additions that were also addressed.

P. 41, l. 16 - p. 42, l. 17

VINCENT TALERICO, having been duly sworn was examined and testified as follows:

- - - -

BY MS. SOMMERS

Q. Mr. Talerico, what is your position with the School District?

A. Special Education Teacher at the Lenape Junior School.

Q. When did you first become involved with Alex?

A. I believe it was in November of 1982.

Q. What was your involvement with him?

A. I saw Alex for reading and math approximately eight class periods during the week.

Q. You are a Special Education Teacher and you were his classroom teacher?

A. One of his classroom teachers.

Q. Did you have an opportunity to observe his program?

A. Yes.

Q. Did you also observe his classroom behavior?

A. Yes, I did. In the classroom Alex was, at times, very cooperative and very positive. But at other times he could be stubborn and negative. He had a great deal of difficulty at times attending to the tasks even in small group instruction. He needed a great deal of one to one support. And often after a small group of three or four were instructed on something, Alex would receive additional one to one instruction, generally on the same material.

P. 50, 1. 25 - p. 52, 1. 2

Q. So that science and social studies were at the grade level of the student; is that correct?

A. The information presented is at the grade level of the student's ability. And I modify the materials to do more reenforcing exercises so that the students can learn the material.

There was a recommendation by the hearing officer's report which included this particular topic, and we included this in our March 28th tentative plan. That's for creative development.

Q. What were the goals on creative development area?

A. The goal was to challenge Alex's cognitive creative skills.

Q. How did you plan on accomplishing this goal?

A. Using materials that are put out by Midwest Publications. There are certain areas of critical thinking and logic that I would use to challenge those areas.

I would create, develope a specific program on an individualized basis, especially in Alex's case.

Q. Why do you believe that the I.E.P. that was created in March of 1984 and was subsequently amended in April of 1984, was appropriate for Alexander?

A. Well, based on the test data and the classroom observations, I believed that the I.E.P. that we developed could easily meet Alex's needs, especially in the area of decoding and the mathematics area.

MS. SOMMER: That's all the questions I have of this witness.

P. 53, l. 16 - p. 55, l. 7

MR. TRENT: At this time, Mr. Muth, if you have any evidence that you would like to enter, or if you want to give testimony, you may do so.

MR. MUTH: Well, I think the best way for me to do so would be do to do it in the following manner: The child, Robert Alexander Muth, was removed from the Central Bucks School System on the advice of a physician. He was placed in a private school, the Landmark School in Pride's Crossing, Massachusetts.

The child demonstrated none of the particular problems in the classroom that he experienced when he was in the Central Bucks School District. He is in a normal classroom setting which begins at eight o'clock in the morning and finishes at 3:30 in the afternoon.

And he moves from class to class just as normal students would move from class to class as they do here at Lenape. He has benefited from the extremely intense daily --

MS. SOMMER: I object to the intense, daily.

MR. TRENT: Overruled, I'll let him continue. Go ahead.

MR. MUTH: The intense, daily tutoring. He is also in a counseling program which is called a milieu therapy. And the present psycho social study has helped to repair his narcissistic wound. This repair is taking place.

The premise that the School District has brought forth that the child is in need of a more restrictive setting, has been demonstrated at the Landmark School to be erroneous. The child is no longer in a supervised study hall, but studies on his own.

He has demonstrated no motivational difficulty with regard to dressing and functioning in the classroom.

As a matter of fact, the tests done by the teachers that I have spoken to both last fall and the spring of this year, have clearly indicated that the child is very highly motivated and has accomplished with minimum goading the educational work that you would expect of a very highly intelligent 14-year old child.

P. 58, l. 17 to p. 59, l. 14

MS. SOMMER: Now, the Landmark School is a school specifically for children with learning disabilities; is that correct?

A. Yes, with gifted potential.

Q. So that when you said he is in a normal classroom setting, you are referring to a normal classroom setting within a school specifically for learning disabled children?

A. I think that would be an appropriate way of looking at it.

MS. SOMMER: I have no further questions.

MR. TRENT: Ms. Sommer, you may give your closing statement.

MS. SOMMER: I'll be very brief. The School District submits it has been and is prepared to provide Robert Alexander Muth not only with a program that is appropriate for him, but a program that will deal with his unique needs in terms of an annual goal, in terms of short term objectives. And we intend to utilize the facilities that we have to see that those objectives are carried out. We have responded appropriately to the concern of the parents. We believe that the I.E.P. plan which was revised as of April 25, 1984, should be declared to be an appropriate program for Robert Alexander Muth.

PLAINTIFF'S
EXHIBIT 3

Due Process Hearing

June 7, 1984

10:00 A.M.

FOR

ROBERT ALEXANDER MUTH

A hearing in the above entitled matter was continued from September 30, 1983 on the above date at the Central Bucks Administration Building, Route 202, Doylestown, Pennsylvania

BEFORE: Vernard Trent
Hearing Officer

Date of Decision: July 25, 1984

HEARING OFFICER'S REPORT

1. Names and Functions of Those Attending the Hearing:

The names of those attending the hearing are listed on page two (2) of the transcript.

2. List of Exhibits:

Exhibits are listed on page (2) of the transcript.

3. Background of Hearing and Terse Statement of the Position of Each Side

On the 23rd day of January 1984, the Secretary of Education remanded the above matter "to the hearing officer for further proceedings." The case was originally heard on September 30, 1983.

Mr. Muth's position is that the district I.E.P. (4/26/84) is not appropriate for it "is simply the same as the present I.E.P. that was applied previously and it did not work" (N.T. p. 7). Further, he felt his constitutional rights were violated. (N.T. p. 5).

The Central Bucks School District contends that the I.E.P. was revised in accordance with the mandate of the Secretary of Education and the hearing officer. With the present revisions an appropriate program is being offered for Alexander Muth (N.T. p. 6).

4. Issues to be Resolved:

The purpose of this hearing is to resolve whether the Central Bucks School District has offered an appropriate educational program for Robert Alexander as stated in the NORA - Notice of

Recommendation Assignment and revised I.E.P. of April 1984.

5. Evidence Presented by the Parties:

A. School District Evidence

The district submitted as evidence on April 26, 1984 I.E.P. as well as testimony from the September 30, 1983 hearing (N.T. p. 8 & 9). This was followed by a chronology of district contacts with Mr. Muth to secure records from the Landmark School and to discuss revisions in the I.E.P. The I.E.P. conference was held on April 26, 1984 at 6 A.M. at Mr. Muth's request (N.T. pp. 11-17). Mr. Muth disapproved of the NORA and I.E.P. (SD-28) and raised specific objections which were later addressed by the school district (N.T. p. 19, SD-18, N.T. pp. 26-29, 32, 37, 42 and 43).

B. Parent's Evidence

Mr. Muth did not submit evidence for the record but made specific statements and declarations. (N.T. pp. 53-55).

6. Uncontested Facts

That Alexander is a learning disabled student experiencing auditory perceptual dysfunction (SD-18) and citations in section seven (7) of the September 30, 1984 hearing.

7. Findings of Fact

The following adjustments were made to the 3/28/84 and 4/26/84 I.E.P.; provisions for adaptive physical education, individual tutorial services and evaluation to determine eligibility for the mentally gifted program in accordance with state standards (SD-18). A more restrictive (self contained) LD program with mainstreaming where appropriate was offered (N.T. p. 44).

8. Conclusions of Law

The conclusions of law delineated in the September 30, 1983 hearing remain intact with the following exception; the adjustments to the I.E.P now coalesce to indicate an educational program (SD-18) which appears to be effective and efficient as required by 22 Pa. Code Ch-13.11(a)(b). The efficacy of this program will have to be tested by Alexander's matriculation in said program to determine its benefits. It does, however, provide basic access. Finally, the district has complied with all procedures related to due process according to 22 Pa. Code 13.21. and 13.31 (SD-18).

9. Recommendations:

1) The district in good faith made substantial adjustments (SD-18) to the I.E.P. and program offered for R.

Alexander Muth. These adjustments now describe an appropriate program of special education for this learning disabled student. Therefore, it is recommended that the school district's program be accepted and implemented as written.

2) Since education is statutory and not constitutional, school codes govern and not necessarily the constitution. Therefore, the parents exceptions should be dismissed.

DATED: July 25, 1984

HEARING OFFICER: Vernard Trent

CENTRAL BUCKS
EXHIBIT 3

Deposition Notes of Testimony of Judith Tolson, July 21, 1986

JUDITH TOLSON, having been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MS. SOMMER:

Q. Mrs. Tolson, by whom are you employed?

A. The Bucks County Intermediate Unit.

Q. In what capacity?

A. Diagnostic Learning Consultant.

. . .

p. 3, l. 8 to p. 13, l. 2

Q. Do you know Alexander Muth?

A. Yes, I do.

Q. When did you first come into contact with Alexander?

A. March of 1983.

Q. What was that contact?

A. I was called to evaluate Alex's academic strengths and weaknesses.

Q. Since march of 1983, have you been involved in reviewing Alexander's record and testing information to prepare an Individualized Educational Program for the 1986-87 school year?

A. Yes, I have.

Q. What was your participation?

A. I was asked to review all information and decide on an educational level.

Q. In connection with your review of the record, I show you a document that we will mark Tolson-1.

(Tolson-1, SRA Skill Profile, marked for the purpose of identification.)

BY MS. SOMMER:

Q. Can you identify Tolson-1?

A. Yes, I can.

Q. What is that?

A. A test profile of the SRA Skill Profile. It's an individualized test given to Robert Muth at the Wyncote Academy.

Q. When you refer to Robert Muth, are you referring to Robert Alexander Muth?

A. Yes, I am.

Q. Did you review that document in connection with your determination of a present educational level of Robert Alexander Muth?

A. Yes, I did.

(Tolson-2, Letter dated April 10, 1984, marked for the purpose of identification.)

BY MS. SOMMER:

Q. I show you a document which we have marke Tolson-2. Do you recognize this document?

A. Yes, I do.

Q. What is it?

A. It's a testing profile of the Landmark School of Robert Muth at the time of his entrance, I believe.

Q. Does the test contain the results from Landmark Academy of September of 1983 and April of 1984?

A. Yes, It does.

Q. Contained in Tolson-2, is there a Fullerton test, showing the test results?

A. Yes, there is.

Q. Is there a Stanford Achievement Test and the test results?

A. Yes, there is.

Q. Is there a document identified as the Testing Profile?

A. Yes.

Q. That contained information about the Gray, G-R-A-Y, Oral Reading Paragraphs and the Slosson Oral Reading Test?

A. Yes.

Q. Does it also contain an evaluation of the Stanford Spelling Test?

A. Yes.

Q. The next page contains a document identified as Expressive One-Word Picture Vocabulary Test?

A. Yes.

Q. Are you familiar with that document?

A. Yes, I am.

Q. You also reviewed this in connection with your review of his records?

A. Yes.

Q. The next document is entitled "Admissions Testing" with the date of the test being as September 12, 1983. It is a five page document.

Did you have occasion to review the Admissions Testing Report?

A. Yes, I did.

Q. In addition to the Wyncote Academy test results, the documents identified as Tolson-2, did you have occasion to review an Individualized Educational Plan?

A. Yes, I did.

(Tolson-3, Individualized Educational Plan, marked for the purpose of identification.)

BY MS. SOMMER:

Q. Now, I show you a document which has been marked Tolson-3 for identification. Do you recognize that document?

A. Yes, I do.

Q. What is that document?

A. An Individualized Educational Plan from the Landmark School.

Q. What period is covered in the Individualized Educational Plan?

A. From September of 1984 through June of 1985.

Q. Is it from 9/12/84 to 6/15/85?

A. Yes.

Q. Did you review all of the documentation contained in the Individualized Educational Plan?

A. Yes, I did.

Q. That's a nine page document; is that correct?

A. That's correct.

(Tolson-4, Psychological Evaluation, marked for the purpose of identification.)

BY MS. SOMMER:

Q. I show you a document which I marked Tolson-4 for identification.

Can you identify this document?

A. Yes.

Q. What is that document?

A. That's a report from Dr. Atkins.

What is the date on the report?

A. 5/13/85.

Q. Did you review this document from Dr. Atkins?

A. Yes, I did.

Q. That's a four page report,; is that correct?

A. That's correct.

Q. Do you recall whether or not you had reviewed any other documentation?

A. I am not aware of any at this point.

Q. What were you looking for when you reviewed these documents?

A. I was looking to see where the present educational level or where Alexander could function at the time of those documents. I was looking to see what kind of programs they had designed for him and whether it was different from our program. Whether they had discovered anything that we had not discovered or whether he had made significant gain or lost any ground in his educational development.

Q. When did you review the documents?

A. In February of this year, 1986.

Q. At the time you reviewed the documents, did you have any information about all of the projected academic program for the school year 1985-86?

A. No, I did not.

(Tolson-5, document entitled "Present Education Levels", marked for the purpose of identification.)

BY MS. SOMMER:

Q. I show you a document that we have marked Tolson-5 for identification. Can you identify this document?

A. Yes, I can.

Q. What is it?

A. It is a Present Educational Levels pages of the IEP that we wrote in February of 1986.

Q. Now, did you prepare these Present Educational Levels, which is a two page document?

A. Yes, I did.

Q. Can you tell me, from reviewing the records of the Landmark Academy and the Wyncote Academy and Dr. Atkins' psychological evaluation, whether you formed any opinion as to Alexander's educational levels as of 1985?

A. Yes, I did.

Q. What were those opinions?

A. The particular levels that he was functioning at that time, his specific academic strengths and weaknesses in reading, math, spelling, written language and writing, basically, his learning style.

Q. Does the Present Educational Levels page identified as Tolson-5 reflect your opinion on Robert's academic levels as of the time that you prepared it?

A. Yes, they do.

Q. Now, you mentioned that you don't have the 1985-86 records. Could your educational levels change and your opinion change depending on the information that would be contained in those records?

A. Yes.

Q. After preparing the Present Educational Levels, did you have an opportunity to discuss these levels with another member of the team?

A. Yes, I did.

Q. And what was the focus of your discussion?

A. Well, from what we have, we decided where his present educational levels are and from all of the information that we have, it was our intention to design a program for him with that information.

Q. Do you know whether or not a program has been finalized, or a prepared finalized program has been prepared for the upcoming school year, 1986-87?

A. I don't know.

Q. You mentioned you had previously tested Alex while he was in the Central Bucks School District.

A. Yes.

Q. Did you have occasion to compare the results of the testing that we had done in the Central Bucks School District with the testing that was done by Landmark and Wyncote Academies?

A. Yes, I did.

Q. Specifically, what were the comparisions?

A. I wanted to see what his longitudinal gains had been in reading, math, spelling particularly. So what I did, I looked at the Wide Range Achievement Test. We ordered that testing in 1980 and then again in 1985. I compared those scores to see the amount of gain Alex had made over the time period.

Q. Now, when was the first Wide Range Achievement Test given?

A. In 1980. Again, three in 1981, two in 1982 and then the time it was given by Dr. Atkins in five of 1985.

Q. Now, could you describe for us the changes in achievement levels between the time it was first given in three of 1980 and the time it was last given while at Central Bucks School in two of 1982?

A. Between that time in reading he went from a grade score, a grade equivalent 2.0 to grade equivalent 3.8.

Then he went from a grade equivalent score of 1.9 to a grande equivalent score of 2.5. In arithmetic he went from a 3.5 grade level to a 4.1 grade level.

Q. What does this represent in terms of growth?

A. Well, in reading he grew approximately a year and one-half. In spelling, a little less than that, I guess it would be about a half a year. In arithmetic he gained almost a full year, slightly less, a few months less than a year.

Q. That was between 1980 and 1982?

A. That's correct.

Q. Between 1982 and 1985, what were the changes in the scores?

A. Dr. Atkins' test results were, in reading he scored -- two of 1982, a 3.8. Dr. Atkins found him at a beginning five. In spelling he scored for us a 2.5. Dr. Atkins found him at the third grade level. In arithmetic he was at 4.1 and for Dr. Atkins it was the sixth grade level.

Q. That was in approximately three years time; is that correct?

A. That's correct.

Q. What were the changes between two of 1982 and five of 1985?

A. In reading it was slightly over a year. In spelling it was about a half a year. In arithmetic it was almost two years.

Q. Did you also have an opportunity to review the goals that had been established for Alexander for the 1983-84 school year in the Central Bucks School District with the goals that were established for the 1984-85 school year at Landmark?

A. Yes, I did.

Q. Could you tell me what observations you made, what comparisons were made?

A. I wanted to compare exactly what the goals were, what the strengths and weaknesses were, what kind of program they were designing for us.

In our IEP in 1983-84, we had strengths in reading that contained a systematic method of decoding words. I noticed that their IEP also reflected the same goal, comprehension was the same, that he learned to find the main ideas and read for detail language. It was also the same as we had. We had seen that he had needed help in oral and written receptive expressive language skills. That continued on also.

We recognized that he had a problem studying, note taking and test taking. It's also reflected in their IEP and that was a goal for him too.

Math, basic computation operations was difficult for him and in 1983-84 continued to be difficult. Landmark had recognized that also.

And written, basically the same thing.

MS. SOMMERS: I have no other questions. Cross examine.

CROSS EXAMINATION

. . .

p. 16, l. 4 to p. 17, l. 14.

BY MR. BOGIN:

Q. Now, do you remember testifying about the Fullerton test?

A. No.

Q. Do you happen to have that in front of you?

A. I don't have the exhibit number.

MS. SOMMER: I believe it's exhibit Tolson-2. It was in the Landmark, exhibit two.

BY MR. BOGIN:

Q. What does the Fullerton test measure?

A. That's a language test as I understand. I was not familiar with the test at all. I went to the Intermediate Unit and spoke with the speech language people to ask them about the test. It's not a very well known test. They only gave me some information, so that I am really not well versed in that test at all. When I say it's not very well known, I mean by our people. That's the Intermediate people. I can't speak for the Central Bucks people, but the Intermediate people.

Q. Well, was it an achievement test, or is it sympton and aptitude?

A. It seems to be a language based test on his expressive and retentive language.

Q. Would you agree that Alexander has some severe language disabilities?

A. Yes.

Q. Would you say that's his greatest or his most severe learning disability?

A. If you include reading, yes.

Q. Is it your opinion that his disability in reading is as a result of his language disability or is that independent from that?

A. I think it's just part of it. I think he also has processing difficulty, too.

Q. All in the verbal area though?

A. It seems to be, yes.

Q. Because in the non-verbal area he is very bright?

A. In the non-verbal area he is very bright, yes.

CENTRAL BUCKS
EXHIBIT 9

CENTRAL BUCKS SCHOOL DISTRICT

Administration Center
315 West State Street
Doylestown, PA. 18901
(215) 345-1400

MULTIDISCIPLINARY TEAM REPORT

Name: Robert A. Muth ( ) Initial Evaluation ____________ (date)

Birthdate: 3/11/70 ( ) Reevaluation: ____________ (date)

School: C. B. East High School Grade: XXXXXXX 11th

It is the recommendation of this team that appropriate educational programming for the above-named student can best be provided through:

Placement in: ____________

Continued placement in: ____________

Change of placement to: LD Classroom for major subjects. Vocational-technical school for one-half day, or elective subjects.

Reevaluation after additional data/evaluations have been completed ____________

(X) Psychological Evaluation ( ) Educational Evaluation
( ) Home Visitation ( ) Parent Conference
( ) Other ____________

Comment: Based upon available data, Robert would benefit from a half day program in the Learning Disabilities Classroom. This would be in a regular education high school where he would have the opportunity to attend the area vo-tech school.

* Signatures of Participants:

____________ Regular Educator (initial evaluation only)
____________ Student's Special Educator
Kathleen A. [illegible] PA. Certified Psychologist
____________ Principal
____________ Counselor
Joyce R. Taylor Special Education Supervisor
Judith A. [illegible] Diagnostic & Learning Consultant
[illegible] Director Pupil Services

*Team member (s) who wish to register a dissenting opinion should do so by attaching a statement to this form.

Distribution: White - Special Education Office Yellow - Child's Record Pink - Special Education Teacher Goldenrod - Psychologist

Date August 11, 1986

School District Central Bucks

PLACEMENT OPTIONS

Section 13.32 of STATE BOARD OF EDUCATION REGULATIONS requires the NOTICE OF RECOMMENDED ASSIGNMENT include a list of educational placement options considered and the reasons why these alternatives were not recommended.

Listed below are the educational assignments considered for your child, and the reasons each placement was found inappropriate.

1. Placement Option (specify): Regular Education

This placement was considered but found inappropriate because:
- X this placement does not meet the student's learning needs
- __ this placement does not provide the student with the opportunity for integration to the maximum extent appropriate with children who are not handicapped
- __ other (explain) ________________

2. Placement Option (specify): Private School

This placement was considered but found inappropriate because:
- __ this placement does not meet the student's learning needs
- X this placement does not provide the student with the opportunity for integration to the maximum extent appropriate with children who are not handicapped
- __ other (explain) ________________

3. Placement Option (specify): ________________

This placement was considered but found inappropriate because:
- __ this placement does not meet the student's learning needs
- __ this placement does not provide the student with the opportunity for integration to the maximum extent appropriate with children who are not handicapped
- __ other (explain) ________________

BCIU · 11/80
Form 7

INDIVIDUALIZED EDUCATION PROGRAM PLAN

Student's Name: Robert A. Muth

Grade/Program: 11th/Learning Disabilities

Birth Date: 3/11/70

Teacher(s): L. Greene/G. Stemplewicz

Present Date:

District/School: Central Bucks/C.B. East High School

Primary Assignment(s):	**Date Started**	**Expected Duration of Services**	**Special Media or Materials**
Grade 11 with L.D. classroom	September, 1986		not at this time

Extent to which the child will participate in regular education: Homeroom everyday. Health and physical education, two periods per week. Extra curricular activities are available at Robert's discretion. Elective subjects as set forth in the 1986-87 course selection guide or half day attendance at the area vocational technical school.

Services:

Physical Education/Adaptive physical education, if appropriate.			
Transportation/regular			
Academic and social counseling			
Evaluation for Gifted program			

IEP Planning Meeting Participants:

	Name
Local Education Agency Representative:	Dr. N. Robert Laws
Parent, Guardian or Surrogate Parent:	
Teachers(s):	

Date for review and/or revision of the Individualized Education Program Plan: within six months of beginning of program.

[illegible]

FINDINGS OF FACT, DISCUSSION, CONCLUSION OF LAW AND ORDER OF AUGUST 28, 1988

[Located in Petition Appendix p. 112a]

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT
JANUARY 29, 1988

[Located in Petition Appendix p. 1a]